No. 00-832-CFX Title: National Cable & Telecommunications Association, Inc., Petitioner
v.
Gulf Power Company, et al.

Docketed:
November 22, 2000 Court: United States Court of Appeals for the Eleventh Circuit

Vide:
00-843

Entry	Date	Proceedings and Orders
	Nov 22 2000	Petition for writ of certiorari filed. (Response due December 22, 2000)
	Dec 22 2000	Brief of respondents American Electric Power Service Corporation, et al. in opposition filed. VIDED.
	Dec 26 2000	Waiver of right of respondent Ameritech Corp. to respond filed.
	Dec 26 2000	Waiver of right of respondent WorldCom, Inc. to respond filed.
	Jan 2 2001	Reply brief of petitioner National Cable Television Association, Inc. filed.
	Jan 3 2001	DISTRIBUTED for Conference of January 19, 2001
	Jan 3 2001	Letter from counsel for the respondents received and distributed
	Jan 22 2001	Petition GRANTED. limited to the following questions: 1) Whether those provisions of the Pole Attachments Act apply to attachments by cable television systems that are simultaneously used to provide high-speed Internet access and conventional cable television programming. 2) Whether those provisions of the Pole Attachments Act apply to attachments by providers of wireless telecommunications services no less than to attachments by providers of wireline telecommunications services. Justice O'Connor OUT. SET FOR ARGUMENT October 2, 2001. **********
	Feb 5 2001	Motion of the Acting Solicitor General to dispense with printing the joint appendix filed.
	Feb 20 2001	Motion of the Acting Solicitor General to dispense with printing the joint appendix GRANTED. Justice O'Connor OUT.
	Feb 28 2001	Order extending time to file merits briefs of petitioners and respondents supporting petitoners to and including April 6, 2001. Order extending time to file merits briefs of respondents opposing petitioners to and including June 5, 2001.
	Mar 6 2001	Letter received from counsel for Ameritech Corporation waiving right to file brief on the merits. VIDED.
	Apr 6 2001	Brief of respondent WorldCom, Inc., in support of petitioners filed. VIDED.
	Apr 6 2001	Brief amicus curiae of Earthlink, Inc. filed. VIDED.
	Apr 6 2001	Brief of petitioner National Cable Television Association, Inc. filed.
	Apr 6 2001	Brief amici curiae of United States Telecom Assn. and

No. 00-832-CFX

Entry	Date	Proceedings and Orders
		Verizon Communications filed. VIDED.
	Apr 6 2001	Brief of Federal Petitioners filed. VIDED.
	Apr 6 2001	Brief amici curiae of Consumers Union, et al. filed. VIDED.
	Jun 5 2001	Brief of respondents American Electric Power Service Corporation, et al. filed. VIDED.
	Jun 5 2001	Brief of respondent TXU Electric Company filed. VIDED.
	Jun 5 2001	Brief of respondents Atlantic City Electric Company, et al. filed. VIDED.
	Jun 5 2001	Brief amicus curiae of Real Access Alliance filed. VIDED.
	Jun 5 2001	Brief amicus curiae of Site Owners & Managers Alliance of Personal Commun.Industry filed. VIDED.
	Jun 5 2001	Brief amici curiae of United Telecom Council and Edison Electric Institute filed. VIDED.
	Jun 13 2001	Motion of the Solicitor General for divided argument filed.
	Jun 29 2001	Motion of the Solicitor General for divided argument GRANTED. Justice O'Connor OUT.
	Jul 6 2001	Reply brief of petitioner National Cable & Television Communications Assn., Inc. filed.
	Jul 11 2001	Reply brief of Federal Petitioners filed. VIDED.
	Jul 11 2001	LODGING consisting of 20 sets of the following:(1) Reply Comments of Electric Utilities Coalition and (2) JointComments of Electric Utilities Coalition, submitted by the Solicitor General and distributed. VIDED.
	Jul 20 2001	CIRCULATED.
	Jul 24 2001	Supplemental brief of petitioner Natl. Cable Television Assn., Inc. filed.
	Sep 4 2001	Record filed.
	Oct 2 2001	ARGUED.

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No. 00-

IN THE

Supreme Court of the United States

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioner,

v.

GULF POWER COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the provision of Internet service by a cable television system divests the Federal Communications Commission of regulatory authority it would otherwise have under 47 U.S.C. § 224 to ensure that the "rates, terms, and conditions" for "any attachment by a cable television system . . . to a pole . . . owned or controlled by a utility" are "just and reasonable."

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings in the Eleventh Circuit are listed in Appendix A, Pet. App. 1a-4a, and Appendix G, Pet. App. 104a.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that it has no parent corporations and it has issued no publicly held stock.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner National Cable Television Association, Inc. ("NCTA") respectfully requests that this Court grant its petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.[1]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is published at 208 F.3d 1263 (11th Cir. 2000) and is reproduced in the Appendix to this Petition ("Pet. App.") at 1a-37a. The *Report and Order* of the Federal Communications Commission ("FCC" or "Commission") is

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[1] NCTA is the principal trade association of the cable television industry in the United States. Its members include owners and operators of cable television systems serving over 90 percent of the nation's cable television households, as well as cable television program networks, cable equipment suppliers, and others interested in or affiliated with the cable television industry.

published at *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 (1998). Relevant portions of the *Report and Order* are reproduced at Pet. App. 38a-68a. The court of appeals' orders denying the petitions for rehearing are unpublished, and its order denying the petitions for rehearing *en banc* is published at 226 F.3d 1220 (11th Cir. 2000) (per curiam). Those orders are reproduced at Pet. App. 77a-96a. The court of appeals' order staying the mandate pending the filing of a petition for certiorari is unpublished and is reproduced at Pet. App. 69a-76a.

JURISDICTION

The court of appeals entered judgment on April 11, 2000, and denied timely petitions for rehearing and petitions for rehearing en banc on September 12, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 703 of the Telecommunications Act of 1996 ("1996 Act") is codified at 47 U.S.C. § 224 ("Section 224"). Section 224 provides, in pertinent part, that (1) a "pole attachment" is "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility," *id.* § 224(a)(4); (2) a "utility" is "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications," *id.* § 224(a)(1); and (3) the FCC "shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable," *id.* § 224(b)(1). The complete text of Section 224 is reproduced at Pet. App. 97a-102a.

Section 706 of the 1996 Act provides that "[t]he Commission . . . shall encourage the deployment on a reasonable

and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . methods that remove barriers to infrastructure investment." 47 U.S.C. § 157, statutory note. The complete text of Section 706 is reproduced at Pet. App. 102a-103a. Section 509 of the 1996 Act provides: "It is the policy of the United States—(1) to promote the continued development of the Internet and other interactive computer services." 47 U.S.C. § 230(b).

STATEMENT OF THE CASE

This case presents the issue whether cable systems that choose to provide Internet services, using the same lines that they use to provide video programming services, thereby forfeit regulatory oversight designed to ensure "just and reasonable" "rates, terms, and conditions" for their access to essential bottleneck facilities owned or controlled by utilities. This issue, which has arisen in a consolidated, nationwide appeal of the FCC's implementation of Section 224, is critical to the development and availability of high-speed Internet services that Congress and the FCC have indicated are vital to the national economy. As Judge Carnes explained, the issue presented here "may affect every person who uses . . . Internet service in this country." Pet. App. 96a.

The decision below warrants review because the court of appeals improperly rejected the FCC's conclusion that a cable operator does not forfeit the protections provided by Section 224 when it provides Internet service to its subscribers in addition to its traditional video programming services. That decision is contrary to the language of Section 224 and conflicts with a prior decision of the D.C. Circuit which deferred to the Commission's reasonable interpretation of Section 224. Moreover, the decision below frustrates the central purposes of the 1996 Act of encouraging competition for communications services by eliminating barriers to market entry and of encouraging the development and availability of Internet and other advanced services.

A. The Cable Television Industry.

Cable television began more than 50 years ago as a means to provide antenna service to households in mountainous or geographically remote areas where reception of over-the-air television signals was poor. J. Goodale, *All About Cable* § 1.02, at 1-6 (2000) ("Goodale, *Cable*"). Since its inception, the cable industry has grown dramatically in its importance to the national economy. In 1950, a total of 70 cable systems transmitted local broadcast signals to just 14,000 subscribers nationwide. By the mid 1980s, nearly 53 million households subscribed to cable services, and today about 7 of 10 television households (more than 65 million) subscribe to a cable television service.

Just as the size of the cable industry has grown, so too has the scope of the services that cable operators provide to their subscribers. In addition to serving as a community "antenna" in areas where reception is otherwise poor, cable operators have expanded their services to include cable programming networks that provide video entertainment and information to the industry's subscribers. Similarly, by the late 1980s, the cable industry began providing its subscribers "nonvideo communications services, such as data transmission." *Texas Utils. Elec. Co.* v. *FCC*, 997 F.2d 925, 927 (D.C. Cir. 1993). Recent technological advances have allowed cable operators, who have invested billions of dollars in the effort, to upgrade further their existing coaxial cables and other equipment so that they can simultaneously carry both traditional video programming services and high-speed or "broadband" Internet access at data transmission speeds hundreds of times faster than the "narrowband" services available through traditional telephone lines. The cable industry thus actively competes against numerous segments of the communications industry to provide high-speed Internet services to consumers nationwide. See Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to*

Accelerate Such Deployment Pursuant to Section 706 of the Telecomms. Act of 1996, 14 FCC Rcd 2398, 2404 (¶ 12) (1999) ("*Section 706 Report*").

As the FCC has noted, "[w]idespread access" to high-speed or broadband Internet services "can increase our nation's productivity and create jobs" as well as "meaningfully improve our educational, social, and health care services." *Section 706 Report*, 14 FCC Rcd at 2400 (¶ 2). Indeed, the FCC has concluded that development of such services is important because it will provide consumers with "the ability to download feature-length movies in a matter of minutes," "change web pages as fast as changing the channel on a television" and create "new possibilities . . . for electronic commerce." *Id.* at 2401 (¶ 3).

As to this important developing high-speed service, the cable industry has been instrumental. See *id.* at 2415-16 (¶ 37) (describing multi-billion dollar investments by cable operators to develop this service). For example, in August 2000, the Commission reported that 1.4 million of the 1.8 million high-speed lines to residential homes and small businesses were provided by cable technology. Second Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, at 33 (¶ 71 & Fig. 5) (FCC Aug. 21, 2000) ("*Second Section 706 Report*"). More recently, the Commission reported that there were 4.3 million broadband lines connecting homes and small businesses to the Internet and that the cable industry provided about 2.2 million such lines. FCC, *Federal Communications Commission Releases Data on High-Speed Services for Internet Access*, at 1 (Oct. 31, 2000) ("FCC, *Data on High-Speed Services for Internet Access*"). The development of these services by the cable industry is likewise spurring development and deployment of competing high-speed

services (known as "DSL") by telephone companies. See *Section 706 Report*, 14 FCC Rcd at 2419 (¶ 42).

Although the cable industry has undergone a remarkable transformation over the past 50 years, it remains equally true today that "to deliver television signals to their subscribers," cable operators "must have a physical carrier for the cable." *FCC* v. *Florida Power Corp.*, 480 U.S. 245, 247 (1987). As this Court has explained, "virtually the only practical physical medium for installation of television cables" has been poles, ducts, and rights-of-way owned or controlled by local utilities. *Id.* Accordingly, a cable system's "right to secure the use of those facilities on reasonable terms may be crucial to its very existence." Goodale, *Cable* § 6.01, at 6-3. Because high-speed Internet services offered by cable operators are "commingled" with traditional cable services "on one transmission facility," Pet. App. 63a (¶ 30), cable operators that provide high-speed Internet services and traditional cable services must rely on utilities for reasonable and affordable access to "poles, ducts, conduits, or rights-of-way" that are necessary to deliver these commingled services to their subscribers. Moreover, the incentive that these utilities have to deny such access on just and reasonable terms has increased because the 1996 Act lifts restrictions that previously prohibited them from diversifying into telecommunications and other services where they can compete against cable entities and others. See Pub. L. No. 104-104, 110 Stat. 56, 81-86, § 103 (1996) (codified at 15 U.S.C. § 79z-5c).

This case presents the issue whether cable operators forfeit regulatory protections that ensure that they will have access to these bottleneck facilities on just and reasonable terms if they choose to provide Internet services as well as their traditional video programming.

B. Statutory And Regulatory Background.

A review of the development of the statutory and regulatory structure governing access by cable operators to bottleneck

facilities is necessary to put the issue presented in this case into proper context.

In 1978, in response to complaints that utility companies were exploiting their monopoly power over bottleneck facilities needed by cable television systems to deliver their services to consumers, Congress enacted the Pole Attachment Act ("1978 Act"). See *Florida Power Corp.*, 480 U.S. at 247. The 1978 Act provided that the FCC "shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." Pub. L. No. 95-234, sec. 6, § 224(b)(1), 92 Stat. 33, 35 (1978).[2] The 1978 Act defined the term "pole attachment" as "*any attachment* by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility." *Id.* (emphasis added). The Commission's rules implementing the 1978 Act and, in particular, its "procedure for determining whether rates" for attachments by cable television systems "are just and reasonable," were affirmed by the D.C. Circuit. *Monongahela Power Co.* v. *FCC*, 655 F.2d 1254, 1256 (D.C. Cir. 1981) (per curiam). The *Monongahela* Court explained that "[t]he statute itself is all-encompassing in its wording: the FCC is to 'regulate the rates, terms, and conditions for pole attachments to provide that [they] are just and reasonable.'" *Id.*

A decade later, the scope of the FCC's authority to regulate "rates, terms, and conditions" again became an issue when the cable industry sought "to enter the growing market for nonvideo communications services, such as data transmission." *Texas Utils.*, 997 F.2d at 927. In that case, a utility

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[2] Further, the 1978 Act provided that a "rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space . . . which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility to the entire pole . . . ." Pub. L. No. 95-234, sec. 6, § 224(d)(1), 92 Stat. 33, 36 (1978)

that provided a cable operator with access to poles necessary to deliver cable services imposed, in addition to the annual rate of $5 per pole, "a surcharge of between $50 and $100 per pole where the cable, at least in part, transmit[ed] nonvideo communications." *Id.* at 927. The FCC rejected claims that its "statutory authority over pole attachment rates was limited to those attachments distributing video programming." *Id.* Rather, the FCC concluded that "'Section 224 is most reasonably read to provide that a cable operator may seek Commission-regulated rates for all pole attachments within its system, *regardless of the type of service provided over the equipment attached to the poles*.'" *Id.* (emphasis added). The D.C. Circuit affirmed, holding that the FCC "arrived at a permissible construction, rational and consistent with the congressional purpose in enacting the [1978 Act]." *Id.*

Against this backdrop, Congress enacted the 1996 Telecommunications Act ("1996 Act"). As this Court has explained, the 1996 Act "fundamentally restructures" the markets for communications services throughout the country and "profoundly affects a crucial segment of the economy worth tens of billions of dollars." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371, 397 (1999). Despite its unquestioned importance, the 1996 Act has been subject to criticism because "in many important respects" it is "a model of ambiguity." *Id.* at 397. There are, however, several components of the 1996 Act that are clear.

First, the 1996 Act clearly was designed to foster increased competition in the markets for the provision of communications services. By its terms, the 1996 Act accomplishes this goal, at least in part, by doing away with barriers put in place by government-granted incumbent monopolies, see, *e.g.*, 47 U.S.C. § 253, by allowing *all* competitors to compete in *all* markets, see, *e.g.*, 15 U.S.C. § 79z-5c; 47 U.S.C. § 541(b)(3)(B), and by requiring firms that control bottleneck facilities to share those facilities on regulated terms with firms that would use them to offer services to the

public, see, *e.g.*, *id.* § 251(c)(3). Further, the 1996 Act directs the FCC to encourage the development and deployment of high-speed Internet services. Specifically, Section 706 of the 1996 Act directs the Commission to "encourage the deployment . . . of advanced telecommunications capability to all Americans . . . by . . . regulating methods that remove barriers to infrastructure investment." 47 U.S.C. § 157, statutory note. In turn, "advanced telecommunications capability" is defined as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications." *Id.* In addressing this directive, the FCC has focused on the development and availability of high-speed Internet service. See, *e.g.*, FCC, *Data on High-Speed Services for Internet Access*, at 1. Indeed, in the 1996 Act, Congress announced that "[i]t is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media." 47 U.S.C. § 230(b).

Consistent with the overarching purposes of this statutory regime, the 1996 Act amended Section 224 to further these pro-competitive goals. The protections provided by Section 224 were expanded to provide a right of "non-discriminatory access" that requires that a utility "shall provide . . . non-discriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." *Id.* § 224(f)(1). Further, while the protections of Section 224 previously applied only to cable operators, the 1996 Act modified Section 224 to extend its protections against the abuse of bottleneck facilities by utilities to "provider[s] of telecommunications service." *Id.* § 224(a)(4). Correspondingly, the structure of the Commission's rate regulations was modified in two ways. First, the preexisting rate structure that applied to attachments by cable operators was expressly "grandfathered" "for any pole attachment used . . . solely to provide cable service." *Id.* § 224(d)(3). A separate rate structure, however, was added

"to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services." *Id.* § 224(e)(1).

Other significant aspects of Section 224 remained unchanged. Specifically, the 1996 amendments imposed no limitation on the Commission's general authority to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." *Id.* § 224(b)(1). Similarly, "pole attachment" continues to be defined as "*any* attachment . . . to a pole, duct, conduit, or right-of-way owned or controlled by a utility." *Id.* § 224(a)(4) (emphasis added).

C. The Commission's Report And Order.

Pursuant to its statutory obligation to implement the amendments to Section 224, the Commission sought and received scores of comments from a wide variety of parties from across the country. *Report and Order*, 13 FCC Rcd 6777, 6857-59 (1998) (Appendix B). As relevant here, the Commission considered whether the 1996 Act restricted the services that cable operators could provide over pole attachments while still being covered by Section 224. In doing so, the Commission explained that prior to the 1996 Act, Section 224 applied to "the provision by a cable operator of both traditional cable services and nontraditional services on a commingled basis over a single network" and "that a cable system providing both video and nonvideo broadband services is not excluded from the benefits of Section 224." Pet. App. 60a-61a & n.111 (¶ 27) (citing *Texas Utils.*, 997 F.2d at 936).

After considering comments by interested parties, the Commission concluded that its prior analysis regarding the regulatory scope of Section 224 had not been "'overruled' by the passage of the 1996 Act insofar as it held that a cable system is entitled to a Commission-regulated rate for pole attachments that the cable system uses to provide commingled

data and video." Pet. App. 62a-63a (¶ 30). The Commission reasoned that under Section 224, as amended, the "definition of 'pole attachment' does not turn on what type of service the attachment is used to provide" but instead "include[s] any attachment by a 'cable television system.'" *Id.* at 63a (¶ 30). Thus, the Commission explained that "the rates, terms and conditions for all pole attachments by a cable television system are subject to the Pole Attachment Act." *Id.* And, applying Section 224(b)(1), the Commission ruled that it "had a duty to ensure that such rates, terms, and conditions are just and reasonable." *Id.*

The Commission explained that it saw "nothing on the face of Section 224 to support the contention that pole owners may charge any fee they wish for Internet and traditional cable services commingled on one transmission facility." Pet. App. 63a (¶ 30). Specifically, the Commission highlighted that the "purpose of the amendments to Section 224 made by the 1996 Act," was "to remedy the inequitable position between pole owners and those seeking pole attachments," *id.* (¶ 31), and that the nature of that relationship "is not altered when the cable operator seeks to provide additional service," *id.* The Commission reasoned that if it were to interpret Section 224 to exclude cable operators that also provide Internet services, then Section 224 "would penalize cable entities that choose to expand their services in a way that will contribute 'to promot[ing] competition in every sector of the communications industry,' as Congress intended in the 1996 Act." *Id.* at 63a-64a (¶ 31) (alteration in original).

D. The Court Of Appeals' Decisions.

Appeals from the *Report and Order* were filed in the Third, Fourth, Sixth, Seventh, Eighth, Eleventh, and D.C. Circuits. Pet. App. 14a-15a. Pursuant to 28 U.S.C. § 2112, these appeals were consolidated, and through a random lottery, were transferred to the Eleventh Circuit. A divided panel rejected the FCC's interpretation of Section 224.

The panel largely ignored the Commission's statutory analysis of Section 224. Instead, the panel ruled that because subsections (d) and (e) of Section 224 provided specific rules governing the rate mechanism for "'solely cable services'" and "telecommunications service," the Commission could only regulate the "'rates, terms, and conditions'" of pole attachments for those specific purposes. Pet. App. 25a, 26a. That is, the panel majority believed that "[f]or the FCC to be able to regulate the rent for an attachment that provides Internet service then, Internet service must qualify as either a cable service or a telecommunications service." *Id.* at 26a. Applying that framework, the panel decided that Internet service was not a "cable service," *id.* at 26a-29a,[3] and that "there is no statutory basis for the FCC to regulate the Internet as a telecommunications service," *id.* at 29a. As a result, the panel majority held that "the 1996 Act does not authorize the FCC to regulate pole attachments for Internet service." *Id.*

In reaching that conclusion, the majority expressly "decline[d]" "to adopt the D.C. Circuit's reasoning in *Texas Utilities*" to "determin[e] whether pole attachments used by a cable television company to provide Internet service are entitled to a regulated rent." Pet. App. 27a-28a n.32. The majority acknowledged that the D.C. Circuit had "deferred to the FCC's interpretation that co-mingled services were covered by section 224," but stated that it felt "no need to follow the reasoning of *Texas Utilities*" because the D.C. Circuit decision was issued "before the 1996 amendments [to Section 224] were enacted." *Id.* at 28a n.32. According to the panel, the 1996 amendments to Section 224 "eliminate[d] the ambiguity" regarding the Commission's authority con-

[3] The panel erroneously suggested that the "FCC argue[d] that Internet service provided by a cable television system is . . . 'solely cable services.'" Pet. App. 25a. In fact, in its *Report and Order*, the Commission stated that it "need not decide at this time . . . the precise category into which Internet services fit." *Id.* at 66a (¶ 34).

fronted by the D.C. Circuit in *Texas Utilities*. *Id.* Therefore, the panel below stated that it was presented "with an entirely different situation from that faced by the D.C. Circuit in *Texas Utilities*." *Id.*

Judge Carnes dissented. He explained that the "plain language" of Section 224 refuted the panel's conclusion regarding the Commission's authority to regulate attachments by cable operators that provide Internet service. Pet. App. 33a. Judge Carnes noted that "Section 224(b)(1) provides that the FCC 'shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable.'" *Id.* at 34a. Further, he explained that "[t]he term 'pole attachment' is defined . . . as '*any* attachment by a cable television system,'" *id.*, and that the word "'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind,'" *id.* (quoting *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997)). Judge Carnes employed that commonsense statutory analysis to conclude that "the FCC has the authority to regulate "*all* attachments, i.e., attachments 'of whatever kind.'" *Id.*

On September 12, 2000, the panel denied petitions by the Commission and NCTA for rehearing and for rehearing en banc. Pet. App. 83a, 87a. Judge Carnes dissented from the denial of rehearing en banc. *Id.* at 88a-96a. In his dissent, Judge Carnes noted that the "order denying rehearing en banc in this case indicates" that "five of the twelve judges in active service on [the Eleventh Circuit] are disqualified from participating in this important case." *Id.* at 89a. Judge Carnes explained that because the Eleventh Circuit's rules require a majority of "all active circuit judges . . . including those judges who are disqualified from participating," the only way that rehearing en banc could be ordered in this case would be if "the judge who authored the majority opinion for the panel want[ed] to have it reviewed by the court sitting en banc." *Id.* at 88a, 90a. Given that this possibility is "rare," Judge Carnes lamented that, in this case, "the law of this circuit is decided

. . . by the vote of a senior judge from another circuit who was on the panel and broke the tie created by the conflicting votes of the two judges of this court in active service who were on the panel." *Id.* at 90a.

That result, Judge Carnes explained, was "particularly unfortunate" "because this is an important case that may affect every person who uses . . . Internet service in this country." Pet. App. 96a. Specifically, Judge Carnes highlighted that this case came to the Eleventh Circuit "on consolidated petitions for review," that it "involve[d] the competing interests of [power] companies, telephone companies, cable television companies, wireless communication companies, Internet service providers, and of course, consumers," *id.*, and that "because this case arose on Hobbs Act review of FCC rules, it may be the last opportunity for *any* court to address the core, industry-shaping issues presented," *id.* (internal quotation marks omitted; emphasis in original). According to Judge Carnes, "[a] more national case could hardly be imagined." *Id.*

NCTA and the FCC filed motions to stay the court of appeals' mandate pending the filing of a petition for a writ of certiorari in this Court. In its motion, NCTA explained that the panel's ruling could "forever alte[r]" the "competitive race" among "cable, utilities, and telephone" for the provision of Internet service and "depriv[e] the American public of the competitive provision of communications service." NCTA's Motion for Stay of Mandate at 10, *Gulf Power Co.* v. *FCC*, No. 98-6222 (11th Cir. 2000). Indeed, after the court of appeals issued its decision, some utilities immediately informed cable operators that they would raise the rates they charged for pole attachments by 500 percent and have argued that the Commission would no longer have jurisdiction over such rates where Internet services are commingled with other communications services. *Id.* at 11-12.

On October 12, 2000, the court of appeals granted the motions to stay the mandate pending the filing of a petition for certiorari. Pet. App. 73a-76a.

REASONS FOR GRANTING THE PETITION

The petition for certiorari should be granted because the court of appeals' decision incorrectly resolved an issue of critical importance to the development of an important component of the Nation's economy and to Congress' goal of ensuring the timely and full deployment of high-speed Internet services to all Americans.

The panel majority erroneously concluded that in the 1996 Act Congress sought to penalize cable television systems by stripping them of the regulatory protections of Section 224 if they choose to provide Internet services that travel along the same lines as their traditional cable television services. That conclusion is wrong. Section 224, by its terms, mandates that the Commission must ensure "just and reasonable" "rates, terms, and conditions" for "pole attachments," which are defined as "any attachment by a cable television system . . . to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4), (b)(1).

Moreover, the decision below conflicts with the D.C. Circuit's conclusion that cable operators do not forfeit the protections of Section 224 when they commingle video and nonvideo data transmissions on the same cable lines. The Eleventh Circuit's effort to distinguish the D.C. Circuit's prior ruling merely highlights that the panel's interpretation of the 1996 amendments to Section 224 cannot be reconciled with the central goals of the 1996 Act. Specifically, the court of appeals concluded that the 1996 Act overruled the decision in *Texas Utilities* insofar as that holding applied to video programming commingled with Internet services. That cannot be the case. To the contrary, the 1996 Act left unchanged the FCC's responsibility to regulate rates for "any" pole

attachment. Moreover, stripping cable operators of essential regulatory protections if they offer Internet services would directly undermine the 1996 Act's goals of fostering competition for the provision of communications services and promoting the continued development and deployment of Internet service. Indeed, the decision below provides no persuasive reason to support its conclusion that Congress intended that cable operators would lose their rights under Section 224 if they further these congressional goals by providing Internet service to their subscribers.

Finally, proper resolution of this issue is of critical importance to a fast-developing component of the communications industry and could have a profound effect on multi-billion dollar investments and the potential for further investment in the competition to provide the high-speed Internet services that Congress sought to promote. Because this case is a consolidation of numerous Hobbs Act appeals filed across the country, the issue decided by the majority cannot be litigated in any other courts of appeals. That fact is especially important because the divided panel's ruling was effectively insulated from en banc review. As explained by Judge Carnes, unless certiorari is granted, the national law on these "industry-shaping issues of exceptional importance" will have been set by "one active judge of [the Eleventh Circuit] joined by a senior judge from another court." Pet. App. 96a.

THE COURT OF APPEALS DECISION REJECTING THE FCC'S AUTHORITY OVER ACCESS BY CABLE TELEVISION SYSTEMS TO BOTTLENECK FACILITIES NECESSARY TO PROVIDE INTERNET SERVICE IS CONTRARY TO 47 U.S.C. § 224, CONFLICTS WITH A DECISION OF THE D.C. CIRCUIT AND UNDERMINES THE PURPOSES OF THE 1996 ACT ON AN ISSUE OF NATIONAL IMPORTANCE.

1. The panel majority's decision holding that cable operators forfeit the protections of Section 224 if they choose to provide Internet service along the same cable lines that

they use to provide traditional cable television services is contrary to the language of Section 224. As this Court repeatedly has explained, "'[t]he starting point in every case involving construction of a statute is the language itself.'" *Landreth Timber Co.* v. *Landreth*, 471 U.S. 681, 685 (1985) (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)).

The language of Section 224 is clear. It provides that "the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. § 224(b)(1). Subsection (a)(4) defines "pole attachment," as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." *Id.* § 224(a)(4). Based on this language, the Commission properly concluded that the "the definition of 'pole attachment' does not turn on what type of service the attachment is used to provide," and therefore "the rates, terms, and conditions for *all* pole attachments by a cable television system are subject to [Section 224]." Pet. App. 63a (¶ 30) (emphasis added).

In its decision, the panel majority ignored this controlling statutory language. Instead, it focused on subsections (d) and (e) of Section 224 and held that these subsections unambiguously *divested* the Commission of authority to regulate pole attachments when a cable operator chooses to provide Internet services as well as traditional cable television programming over the same facilities. Pet. App. 25a & n.29. According to the panel, because Congress dictated the rate mechanism that the Commission should apply for a "cable television system solely to provide cable service," 47 U.S.C. § 224(d)(3), and "telecommunications carriers to provide telecommunications services," *id.* § 224(e)(1), Congress thereby stripped the Commission of all authority to regulate the "rates, terms, and conditions" for pole attachments under any other circumstances. Pet. App. 26a, 29a.

But that conclusion is clearly wrong. When Congress amended Section 224 in 1996, the law was settled that Section 224 already authorized the Commission to regulate pole attachments by a cable operator "regardless of the type of service provided over the equipment attached to the poles." *Texas Utils. Elec. Co.* v. *FCC*, 997 F.2d 925, 927 (D.C. Cir. 1993) (internal quotes omitted).[4] In the 1996 Act, Congress did not retreat from that understanding, but instead *expanded* the scope of Section 224 by extending the protections previously accorded only to "cable television system[s]" to apply to "provider[s] of telecommunications service" as well. 47 U.S.C. § 224(a)(4).[5] In connection with this expansion of Section 224, Congress made clear that (1) the rate structure for cable operators that "solely" provided "cable service" under the amended Section 224, would remain unaffected by the amendments to Section 224, *id.* § 224(d)(3), and (2) a slightly higher rate structure would apply for "telecommunications carriers" that used pole attachments "to provide telecommunications services," *id.* § 224(e)(1). These provisions merely grandfather the existing rate structure for attachments used "solely to provide cable service," *id.* § 224(d)(3), and ensure that there is a level playing field among entities that use pole attachments to provide "telecommunications services," *id.* § 224(e)(1).

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[4] *Cf. Allen* v. *Grand Cent. Aircraft Co.*, 347 U.S. 535, 545 (1954) (applying the "natural presumption that Congress, in its subsequent actions, accepted [agency interpretation of a statute] as legitimate"); 2B N. Singer, *Sutherland Statutory Construction* § 49.09, at 108 (6th ed. 2000) (noting that legislature "impliedly adopts" a "contemporaneous interpretation of a statute, especially when made by an administrative body . . . charged with the duty of administering or enforcing that statute").

[5] *See also* 47 U.S.C. § 224(f) (expanding Section 224 to require utilities to "provide . . . non-discriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it").

Subsections (d) and (e), however, do not reveal any congressional intent to remove attachments that cable operators use to provide Internet service from the purview of Section 224(b). Simply put, when Congress dictated the mechanism that the Commission should employ when setting rates under two specific circumstances, Congress did not, by negative implication, divest the Commission of its established authority to ensure "just and reasonable" "rates, terms, and conditions" for pole attachments by cable operators that provide both traditional cable service and Internet service. Indeed, the decision below never suggests any plausible reason that Congress would have intended to dissuade cable entities from expanding their services to include Internet service. But that is precisely the effect of the court of appeals' decision that cable operators forfeit valuable regulatory protections under Section 224 if they provide Internet service to their subscribers.

2. Not only is the panel majority's decision wrong, but it also creates a conflict with the decision of the D.C. Circuit in *Texas Utilities Electric Co.* v. *FCC*, 997 F.2d 925 (D.C. Cir. 1993). In *Texas Utilities*, the D.C. Circuit affirmed the Commission's conclusion that its authority under Section 224 extended to ensuring "just and reasonable" "rates, terms, and conditions" for cable television systems that provided both traditional video programming and nonvideo communications. *Id.* at 927. In doing so, the D.C. Circuit noted that "[t]he pole attachments subject to the FCC's regulatory authority are defined as 'any attachment by a cable television system to a pole . . . owned or controlled by a utility.'" *Id.* at 929 (quoting 47 U.S.C. § 224(a)(4)). Specifically, the D.C. Circuit held that the FCC "arrived at a permissible construction, rational and consistent with the congressional purpose in enacting the [1978 Act]" when it concluded that it "may prohibit a utility from charging a cable television system operator an unregulated pole attachment rate because some cable attachments within the system are used to transmit

nonvideo communications." *Id.* at 927. In contrast, the panel below expressly "decline[d]" to adopt the D.C. Circuit's reasoning in *Texas Utilities*, Pet. App. 28a n.32, and held that Section 224 "does not authorize the FCC to regulate pole attachments for Internet service," *id.* at 29a.

3. To be sure, the panel majority argued that its decision could be reconciled with the D.C. Circuit's *Texas Utilities* ruling. But the panel's efforts to do so are unpersuasive and further highlight that the panel's decision is contrary to the language of Section 224 and the purposes underlying Section 224 and the 1996 Act. Specifically, the panel argued that "Congress, in 1996, amended [Section 224] to eliminate the ambiguity" confronted by the D.C. Circuit in *Texas Utilities*, and therefore it was "faced with an entirely different situation from that faced by the D.C. Circuit." Pet. App. 28a n.32. The panel contended that "[t]he new section 224(d)(3) states that 'solely cable services' receive regulated rents." *Id.* That conclusion should be rejected.

Contrary to the panel's decision, the "new section 224(d)(3)" does *not* state that "solely cable services" will receive regulated rents. Rather, Section 224(d)(3) provides that "any pole attachment used by a cable television system solely to provide cable service" will be governed by the rate structure set forth in Section 224(d). 47 U.S.C. § 224(d)(3). Similarly, Section 224(e)(1) provides that pole attachments "used by telecommunications carriers to provide telecommunications services" are governed by the rate formula set forth in subsection (e). As demonstrated above, these new provisions do not purport to divest the FCC of regulatory authority over "rates, terms, and conditions" of pole attachments in all other circumstances. *Id.* § 224(b)(1).

Congress' use of the word "solely" in subsection (d) simply distinguishes the rates applicable to cable service from those that will apply to attachments for "telecommunications" service in subsection (e). That is, the word "solely" was not intended to limit the FCC's authority under subsections (b)(1)

and (a)(4) to ensure "just and reasonable" rates for "any attachment." 47 U.S.C. § 224(a)(4), (b)(1). To read this language otherwise would require the conclusion that Congress sought to overrule the D.C. Circuit's decision in *Texas Utilities*, a result for which there is absolutely no support. Moreover, acceptance of that conclusion would lead to the absurd result that the 1996 Act's goal of encouraging the development and deployment of high-speed Internet services by cable operators, using the same cables and pole attachments for traditional cable video programming, was subordinate to the ability of utilities to charge whatever rate they want when cable operators offer Internet services, even though the transmission of Internet services on those cable lines imposes no new burden on the utility.

In short, nothing in the 1996 amendments either expressly or implicitly affects the scope of subsection (b), which grants the FCC authority to ensure "just and reasonable" "rates, terms, and conditions" of "pole attachments" nor subsection (a)(4), which still defines "pole attachment" to mean "any attachment by a cable television system . . . to a pole . . . owned or controlled by a utility." 47 U.S.C. § 224(a)(4), (b)(1). Put another way, the operative language of Section 224, as amended by the 1996 Act, is the same, in all material respects, as the language considered by the D.C. Circuit in *Texas Utilities*. Accordingly, the panel majority's decision regarding the scope of the FCC's authority under Section 224 is in direct conflict with a decision of the D.C. Circuit.

Further, the panel's analysis is entirely backwards because it presumes that the 1996 Act sought to *limit* the scope of the regulatory protections provided by Section 224 when, in fact, the 1996 Act *expanded* the reach of Section 224. Indeed, the panel's analysis cannot be reconciled with the 1996 Act, whose manifest goal is to eliminate the ability of entities to exercise monopoly control over essential bottleneck facilities that create barriers to competition for communications services. Of course, when construing a statute, this Court consid-

ers "the provisions of the whole law" including "its object and policy." *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 35 (1990). That is, the meaning of a statute "is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

The 1996 Act was designed to foster competition among communications service providers by reducing the restraints imposed by government-granted incumbent monopolies. Thus, under the 1996 Act, monopoly state telephone franchises were preempted, 47 U.S.C. § 253, incumbent local exchange carriers ("LECs") were required to share their networks with competitors, *id.* § 251(c)(3), local franchising authorities were limited in their ability to restrict local competition, *id.* § 541(b)(3)(B), and public utilities were freed of legal restrictions that prevented diversification into telecommunications, 15 U.S.C. § 79z-5c. As a result of the 1996 Act, "States may no longer enforce laws that impede competition, and incumbent LECs are subject to a host of duties to facilitate market entry." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). Apart from promoting competition by lowering barriers to market entry, in the 1996 Act, Congress also expressed a national policy "to promote the continued development of the Internet." 47 U.S.C. § 230(b)(1). Indeed, in Section 706 of the 1996 Act, Congress authorized the Commission, if it concludes that advanced telecommunications capability is not being deployed in a reasonable and timely manner, to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." *Id.* § 157, statutory note (b).

In light of these provisions, it strains credulity to suggest that Congress intended to limit the Commission's authority under Section 224 and thereby penalize "cable entities that choose to expand their services in a way that w[ould] contrib-

ute 'to promot[ing] competition in every sector of the communications industry,' as Congress intended in the 1996 Act." Pet. App. 63a-64a (¶ 31) (second alteration in original). This is particularly true because the bottleneck control over essential facilities possessed by utilities is in no way altered "when the cable operator seeks to provide additional service." *Id.* at 63a.

But even if the changes to Section 224 brought about by the 1996 Act could be deemed to render the scope of the Commission's authority ambiguous, then the Commission's reasonable interpretation must prevail. Indeed, this Court has highlighted that, far from being a model of clarity, the 1996 Act "is in many important respects a model of ambiguity." *Iowa Utils. Bd.*, 525 U.S. at 397. And, "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *Id.* (citing *Chevron* v. *NRDC*, 467 U.S. 837, 842-43 (1984)).

4. Further, the development and availability of high-speed Internet services throughout the Nation, goals which the decision below undermines, are of surpassing national importance under the 1996 Act.

As Judge Carnes explained, "this is an important case that may affect every person who uses . . . Internet service in this country" because it establishes the law, nationwide, on "industry-shaping issues." Pet. App. 96a. Indeed, this case arises from consolidated petitions for review of the FCC's rules filed by power companies from around the country, see *supra* at 12, and, as Judge Carnes put it, "involves the competing interests of those companies, telephone companies, cable television companies, wireless communication companies, Internet service providers, and of course, consumers." Pet. App. 96a. Moreover, "'because this case arose on Hobbs Act review of FCC rules, it may present the last opportunity for *any* court to address the core, industry-shaping issues

presented here.'" *Id.*[6] As Judges Carnes noted, "[a] more national case could hardly be imagined." *Id.*

That assessment is well founded because the panel majority's decision places substantial private and public national interests in jeopardy. If permitted to stand, the panel majority's rejection of the FCC's rules will present cable operators throughout the country with a stark Hobson's choice. Having already invested billions of dollars to upgrade their facilities to provide two-way Internet services, the only way that these cable operators can ensure continued access at reasonable terms to essential bottleneck facilities is by declining to provide those high-speed Internet services to their subscribers. Alternatively, cable operators can continue to provide Internet service knowing that the controlling legal standard applied throughout the nation dictates that, by doing so, they will forfeit the regulatory protections provided by Section 224. See Pet. App. 29a.

But such exploitation by utilities of these bottleneck facilities is the precise concern to which Congress responded when it originally authorized the Commission to ensure that the "terms, rates, and conditions" of such arrangements were "just and reasonable." 47 U.S.C. § 224(b)(1) (1978). Indeed, the potential for such abuse has increased because, under the 1996 Act, utilities that are required to provide access to poles under Section 224 now may be authorized to compete against cable operators for the provision of Internet service. 15 U.S.C. § 79z-5c. In fact, "[a] growing number of public utilities" are competing directly with cable operators in the market for Internet services. *Section 706 Report*, 14 FCC Rcd at 2427 (¶ 55). Thus, it comes as no surprise that, after the panel entered its judgment, utilities informed cable operators

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[6] The Hobbs Act provides, that "[t]he court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—(1) all final orders of the Federal Communications Commission . . . ." 28 U.S.C. § 2342.

that they intend to impose a 500 percent increase in the rent for access to their utility poles, and have argued that the Commission will no longer have jurisdiction over these rates where cable operators commingle Internet services with their traditional cable service. NCTA's Motion to Stay Mandate at 11, *Gulf Power Co.* v. *FCC*, No. 98-6222 (11th Cir. 2000). Resolution of this legal issue therefore will have an industry-defining effect on the cable industry's ability to develop high-speed Internet services.

Finally, the panel decision, if left uncorrected by this Court, runs headlong against Congress' express goal of continuing the development and deployment of Internet services. 47 U.S.C. § 230(b)(1); see also *Iowa Utils. Bd.*, 525 U.S. at 397 (noting that 1996 Act affects a "crucial segment" of the economy "worth tens of billions of dollars"). Specifically, Congress directed the FCC to "encourage the deployment on a reasonable and timely basis" of these high-speed (broadband) communications services, 47 U.S.C. § 157, statutory note (a), and gave the FCC authority to "remov[e] barriers to infrastructure investment" if such services are not being "deployed to all Americans in a reasonable and timely fashion," *id.* § 157, statutory note (b). In furthering that congressional command, the Commission has explained that "[w]idespread access to broadband capability can increase our nation's productivity and create jobs" as well as "meaningfully improve our educational, social, and health care services." *Section 706 Report*, 14 FCC Rcd at 2400-01, (¶ 2). The panel's decision undermines those goals by erecting a barrier to competition and "penaliz[ing] cable entities that choose to expand their services in a way that will contribute 'to promoting competition in every sector of the communications industry,' as Congress intended in the 1996 Act." Pet. App. 63a-64a (¶ 31).

5. Lastly, the importance of review is underscored in this case because the panel majority's decision was effectively insulated from en banc review. Because five of the twelve

active judges from the Eleventh Circuit were recused, the only way that a majority of all of the active judges (seven judges) could have ordered en banc review would have been if the author of the panel decision voted to have the en banc court hear his own case. Pet. App. 90a. As Judge Carnes explained, the rationale underlying the Eleventh Circuit's en banc rules suggests that these restrictive standards might be justified because "'[i]n cases of exceptional importance . . . it may be expected that the Supreme Court will grant certiorari and settle the question in issue.'" Pet. App. 96a (alteration in original) (quoting *Zahn* v. *International Paper Co.*, 469 F.2d 1033, 1041 (2d Cir. 1972)). This is just such a case.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT.

GULF POWER COMPANY; ALABAMA POWER COMPANY, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

TAMPA ELECTRIC COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

FLORIDA POWER & LIGHT COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

COMMONWEALTH EDISON COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Respondents.

POTOMAC ELECTRIC POWER COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

TEXAS UTILITIES ELECTRIC COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

UNION ELECTRIC COMPANY, d.b.a. AMERENUE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

AMERICAN ELECTRIC POWER SERVICES CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

DUKE ENERGY CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

VIRGINIA ELECTRIC AND POWER COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

CAROLINA POWER & LIGHT COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

DUQUESNE LIGHT COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

DELMARVA POWER AND LIGHT,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

Nos. 98-6222, 98-2589, 98-4675, 98-6414, 98-6430, 98-6431, 98-6442, 98-6458, 98-6476 to 98-6478, 98-6485 and 98-6486.

April 11, 2000.

Petitions for Review of an Order of the Federal Communications Commission.

Before TJOFLAT and CARNES, Circuit Judges, and GARWOOD*, Senior Circuit Judge.

TJOFLAT, Circuit Judge:

The 1996 Pole Attachment Act, 47 U.S.C. § 224 (Supp.II. 1996) (the "1996 Act"), gives providers of cable and telecommunications services the right to attach wires to the poles of power and telephone companies. If the power and telephone companies will not accept the rent the providers offer to pay, the Federal Communications Commission (the "FCC" or "Commission") sets the rent. In *In re Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 F.C.C.R. 6777, 1998 WL 46987 (1998) (codified at 47 C.F.R. §§ 1.1401-1.1418 (1999)47 CFRS 1.1418 CFRLQ) [sic] ("*Report and Order*"), the FCC promulgated a formula

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* Honorable Will L. Garwood, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

for computing that rent. The FCC also ruled (in the *Report and Order*) that the 1996 Act precluded utilities (power and telephone) from receiving rent for wires that were "overlashed" to wires previously attached to their poles;[1] that the 1996 Act gave it authority to regulate the placement of wireless communications equipment and attachments for Internet service on utility poles; and that the Act precluded utilities from receiving rent for unused wires contained within fiber optic cables, "dark fiber,"[2] attached to the poles.

In these consolidated petitions for review of the *Report and Order*, several power companies[3] (the "Petitioners") challenge the FCC's formula for determining rent on the ground that, when implemented, the formula will operate to take their property without just compensation, in violation of the Fifth Amendment. We decline to reach this takings claim, because it is not ripe. The Petitioners also challenge the FCC's other rulings. As to those rulings, we find unripe their challenge to the overlashing provision of the *Report and Order*; we hold that the FCC lacks authority to regulate the placement of

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[1] Overlashing occurs when an attacher physically ties additional cables to cables already attached to a pole. *See Report and Order*, 13 F.C.C.R. 6777, 6805, 1998 WL 46987 (1998).

[2] Dark fiber is "bare capacity and does not involve any of the electronics necessary to transmit or receive signals over that capacity." *Report and Order*, 13 F.C.C.R. at 6810.

[3] The utilities involved in this proceeding either as petitioners or intervenors are Gulf Power Company, Alabama Power Company, Georgia Power Company, Southern Company Services, Tampa Electric Company, Potomac Electric Power Company, Virginia Electric & Power Company, Carolina Power & Light Company, Duquesne Light Company, Delmarva Power & Light Company, Public Service Electric & Gas Company, Houston Lighting & Power Company, Texas Utilities Electric Company, American Electric Power Service Corporation, Commonwealth Edison Company, Duke Energy Corporation, Union Electric Company, and Florida Power and Light Company.

wireless equipment on utility poles and attachments for Internet service; and that its decision regarding dark fiber constitutes a reasonable interpretation of the 1996 Act.

I.

A.

From its inception, the cable television industry has attached its cables to the utility poles of power and telephone companies.[4] They have done so because factors such as zoning restrictions, environmental regulations, and start-up costs have rendered other options infeasible. Despite this dearth of alternatives, the attachment agreements between cable television companies and utility companies have generally been voluntary. But, the lack of alternatives has given the power and telephone companies an advantage in negotiating attachment agreements: their monopoly in the supply of poles that could accommodate television cables has allowed them, in the past, to charge monopoly rents.

In an effort to solve the monopoly pricing problem, Congress, in 1978, enacted the Pole Attachment Act, Pub.L. 95-234, 92 Stat. 33 (1978) (codified at 47 U.S.C. § 224 (1994)) (the "1978 Act"), as an amendment to the Communications Act of 1934. The solution Congress articulated in that act was to specify a range of rents telephone and power companies could charge the cable television companies they allowed

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[4] In 1978, when Congress decided to intervene as described in the text *infra*, approximately 95 percent of cable television wires were attached to utility poles because cable television companies owned less than 10,000 poles, compared to over ten million poles owned by the power and telephone companies. *See* S.Rep. No. 95-580, at 12-13 (1978), *reprinted in* 1978 U.S.C.C.A.N. 109, 120-21.

to attach to their poles.[5] Congress' solution, in the 1978 Act, did not, however, change the voluntary nature of the attachment arrangement. As before, the cable television companies had no right to attach; thus, utilities could reject a cable television company's offer to attach. As for the attachments already in place, the 1978 Act effectively changed their terms.[6] In the event the parties could not agree to the rent and conditions of an attachment, and the State chose not to regulate the terms of attachments, the FCC would settle the issue.[7]

The rule the FCC promulgated to implement its authority under the 1978 Act reflected its limited authority; that rule merely "provided complaint and enforcement procedures to ensure that rates, terms and conditions for cable television pole attachments [we]re just and reasonable." 47 C.F.R. § 1.1401 (1978). The rule set forth (1) the procedure for filing a complaint about rents or conditions of attachment, *see id.*;

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[5] Congress expressed this range as:

> [N]ot less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

47 U.S.C. § 224(d)(1) (1994). This range is more commonly expressed as not less than the incremental cost of adding a particular attachment, nor more than the fully allocated costs of the pole.

[6] Since the 1978 Act did not give the cable television companies the right to attach, the utilities could have avoided the FCC's regulation of rent and conditions of attachment under the Act by canceling the existing arrangements, and having the attachments removed. For obvious reasons, the utilities did not take this step.

[7] The FCC already possessed regulatory authority over the telephone industry. *See* 47 U.S.C. § 151 (1994). The passage of the 1978 Act gave the FCC the authority to regulate power companies as well, albeit in the limited manner described in the text. *See* 47 U.S.C. § 224(a)-(c) (1994).

(2) factors to be considered by the administrative law judge in determining the lawfulness of the rent or conditions the utility sought, *see id.*; and (3) a formula for determining the maximum rent the utility could receive, *see* 47 C.F.R. § 1.1409. Under the formula, the maximum rent a utility could charge was the attacher's proportionate share[8] of the bare costs of maintaining the pole and the "carrying charges"[9] associated with the pole.

After the FCC promulgated its rule, several cable television companies in Florida filed complaints with the FCC, contending that Florida Power Corporation was charging them unreasonable rents to attach. *See FCC v. Florida Power Corp.*, 480 U.S. 245, 248-49, 107 S.Ct. 1107, 1110, 94 L.Ed.2d 282 (1987). The FCC agreed that the rents were unreasonable and set a lower rent. Florida Power appealed the FCC's decision to this court, which held that the rent the FCC had set effected a taking of Florida Power's property without just compensation. *Florida Power Corp. v. FCC*, 772 F.2d 1537, 1546 (11th Cir.1985). The Supreme Court reversed, holding that no taking occurred because Florida Power had voluntarily agreed to the cable companies' attachments. Had Congress, in the 1978 Act, required utilities to allow the attachments, a taking may have occurred, the court suggested. *See Florida Power Corp.* 480 U.S. at 251 n. 6, 107 S.Ct. at 1111 n. 6.

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[8] The attacher's proportionate share equaled the amount of space occupied by the attacher divided by the amount of total "usable space."

[9] The FCC regulations do not define carrying charges, but according to *Black's Law Dictionary*, they are "[e]xpenses incident to property ownership, such as taxes and upkeep." *Black's Law Dictionary* 205 (7th ed.1999). The Department of Agriculture's regulations define carrying charges as incidental costs associated with storing a commodity before delivery under a sales contract, *see* 7 C.F.R. § 1488.2(f) (1999), and the Securities and Exchange Commission defines them in the leverage contract context as service and interest charges, *see* 17 C.F.R. § 31.4(*l*) (1999).

The *Florida Power* decision clarified two fundamental precepts underlying the 1978 Act and the FCC's implementing regulations: (1) the FCC had narrow authority under the 1978 Act; it could regulate the power companies only to ensure that, once they consented to an attachment, the conditions of attachment and the rent they were to receive were reasonable; and (2) the FCC's rent formula was not subject to judicial review under the Fifth Amendment's Takings Clause because the 1978 Act's voluntary attachment provision effected no taking for which just compensation would be due.

Not long after the Court decided *Florida Power*, Congress decided to foster competition in the cable television industry. To that end, it enacted the Cable Communications Policy Act of 1984, Pub.L. No. 98-549, 98 Stat. 2779 (1984) (codified at 47 U.S.C. §§ 521-559 (1994)) (the "Cable Act"). Prior to this enactment, cable television companies operated under exclusive franchises granted by a local government, usually a municipality. Because these franchises effectively gave the companies monopolies in the franchise territory, the local governments regulated the rates they could charge subscribers. *See* H.R.Rep. No. 98-934, at 23-24, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4660-61.[10] The approach Congress adopted to encourage competition was to eliminate the power of local governments to set rates for "basic" cable service. Congress realized that, in the short run at least, this would give incumbent cable operators the ability to charge their subscribers monopoly prices. Prices would decrease in the long run, however, as local governments granted additional franchises for a given territory. *See Johnson Enters., Inc. v. FPL*

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[10] The local governments set the rates the cable companies could charge subscribers for "basic" services. Some states and the FCC set the rates the companies could charge for other services, such as Home Box Office. *See* H.R.Rep. No. 98-934, at 24 (1984); *reprinted in* 1984 U.S.C.C.A.N. at 4661.

Group, Inc., 162 F.3d 1290, 1296 (11th Cir.1998). New cable companies would be able to enter the market and compete with the incumbent cable company though, only if they could obtain utility pole attachments on the same terms as those given to the incumbent.

In addition to these new demands for pole space, a host of new telecommunications carriers (such as new long distance telephone carriers and wide area telephone service providers), which used wires to carry their signals, began calling on the power and telephone companies to lease them space. They did so because utility poles afforded the only feasible means for stringing their wires. Since the 1978 Act only regulated the rents utilities could charge cable television companies, many utilities demanded monopoly rents from telecommunications carriers. In an effort to alleviate this problem, Congress, in 1996, amended the 1978 Act to give entities providing telecommunications and cable television service the right to "nondiscriminatory access" to utility poles. *See* 47 U.S.C. § 224(f) (Supp. II 1996).[11] In the event the parties could not agree to the terms of the attachment, including the rent, the 1996 Act authorized the FCC to set "just and reasonable" terms. *See id.* § 224(b)(1).

The 1996 Act also (1) redefined "utility," changing the definition from "any person whose rates or charges are regu-

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[11] Section 224(f) provides:

> (1) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.
>
> (2) Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a nondiscriminatory basis where there is insufficient capacity and for reasons of safety, reliability, and generally applicable engineering purposes.

lated by the Federal Government or a State" to "any person who is a local exchange carrier, or a electric, gas, water, steam, or other public utility;"[12] (2) redefined "pole attachment" to include attachments by providers of telecommunications service;[13] (3) directed the FCC to create a formula for determining the attachment rent a utility could charge a telecommunications service provider;[14] and (4) instructed utilities on how to apportion the costs of "unusable" and "usable" space on their poles among telecommunications service providers.[15]

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[12] Both definitions of "utility" also require the ownership of poles, used at least in part, for wire communication. *Compare* 47 U.S.C. § 224(a)(1) (1994), *with* 47 U.S.C. § 224(a)(1) (Supp. II 1996). Thus, if an entity's poles do not have attachments that are transmitting "writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable or other like connection," 47 U.S.C. § 153(51) (Supp. II 1996), the entity is not a utility for purposes of the Act.

[13] *Compare* 47 U.S.C. 224(a)(4)[sic](1994), *with* 47 U.S.C. § 224(a)(4) (Supp. II 1996). The 1996 version of the Act defined telecommunications, telecommunications carrier, and telecommunications service as follows: "Telecommunications" is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received," 47 U.S.C. § 153(43) (Supp. II 1996); "telecommunications carrier" is any provider of telecommunications services, 47 U.S.C. § 153(44) (Supp. II 1996); "telecommunications service" is the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of facilities used," 47 U.S.C. § 153(46) (Supp. II 1996).

[14] *See* 47 U.S.C. § 224(e)(1) (Supp. II 1996). For purposes of this opinion, the term "telecommunications service providers" includes cable television companies that provide telecommunications services in addition to cable services.

[15] *See* 47 U.S.C. § 224(e)(2), (3) (Supp. II 1996). Section 224(e)(2) requires utilities to apportion the costs of "unusable space" as follows:

> A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities

On February 6, 1998, the FCC promulgated regulations implementing its authority under the 1996 Act. *See Report and Order*, 13 F.C.C.R. 6777, 1998 WL 46987. In the *Report and Order*, the FCC interpreted section 224(f) of the 1996 Act to require that utility companies give Internet providers access to their poles because the Internet was a cable service. *See id.* at 6795-96. Further, it interpreted the language of section 224(a)(4), which states that pole attachment meant *any* attachment, and section 224(d)(3), which provides that the FCC's rate applied to *any* attachment by a telecommunications carrier, to mean that telephone and power companies would have to accept pole attachments for wireless telephone equipment. *See id.* at 6798-99; *see also infra* n.22. The agency also determined that the Act precludes utilities from receiving rent for overlashed wires unless those wires significantly increase the burden on the pole. *See id.* at 6807. Finally, the FCC interpreted the Act to prohibit utilities from receiving rent for dark fiber. *See id.* at 6810.

Having thus interpreted the scope of its authority, the FCC articulated formulas for determining the attachment rents utilities may charge telecommunications service providers. *See id.* at 6820-30. Until February 2001, the 1978 Act's maximum rent formula for cable providers applies to attachments by telecommunications service providers. After that,

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so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

Section 224(e)(3) requires utilities to apportion the costs of "usable space" as follows:

> A utility shall apportion the costs of providing usable space among all entities according to the percentage of usable space required for each entity.

the maximum rent will equal the sum of the "unusable" and "usable" rate factors.[16]

In this amended rule, the FCC incorporated almost verbatim the complaint process articulated in its 1978 rule. *See* 47 C.F.R. §§ 1.1404, 1.1409 (1999). If the parties cannot agree to the rent or other terms of an attachment (or if the utility denies access to its poles), the party contending that the rent or other terms are unjust and unreasonable may petition the Commission to settle the matter. That party bears the burden of establishing a *prima facie* case that the other party's position is unjust and unreasonable.[17] If the complainant fails to make out a *prima facie* case, the FCC must dismiss its complaint, in which case the rent or conditions offered or demanded govern the transaction.[18] If a *prima facie* case is es-

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[16] For poles, the "unusable space" factor = 2/3 x (the percentage of the total pole space that is unusable) x (the attacher's share of the bare costs of maintaining the pole) x (carrying charges). The "usable space" factor = (the percentage of total usable space occupied by the attacher) x (the percentage of total pole space that is usable) x (net costs of the bare pole) x (carrying charges). For conduits, the "unusable space" factor = 2/3 x (net linear costs of unusable space divided by the number of attachers) x (carrying charges). The "usable space" factor for conduits = 1/2 x (1 duct divided by the average number of ducts less adjustments for maintenance ducts) x (linear cost of usable conduit space) x (carrying charges). 47 C.F.R. §§ 1.1417, 1.1418 (1999); *Report and Order*, 13 F.C.C.R. at 6820-33.

[17] For example, if the party seeking attachment complains that the utility is demanding an unreasonable rent (i.e., more than the maximum allowed under the FCC's formula), it bears the burden of proving that the rent demanded is more than the fully allocated costs of the pole.

[18] It is possible that the Commission's disposition of a complaint—whether a dismissal or an order setting one or more terms—may turn out to be provisional if, after the decision issues, the putative attacher decides to withdraw its request for an attachment. In this opinion, we assume for sake of discussion that the putative attacher does not withdraw its request and abides by the Commission's decision.

tablished, the Commission determines the *maximum* just and reasonable rent allowed under the rule's formula. Then, it decides the specific just and reasonable rent the complainant should pay or receive for the attachment. This determination involves reviewing items such as costs, rate of return on investment, the utility's filings before state or federal regulatory agencies, and engineering studies, *see* 47 C.F.R. § 1.1404(g)(1)-(13) (1999), in addition to considering the maximum rent the FCC's formula yields. The FCC's final rate order, like any of its final orders, is then subject to judicial review under 47 U.S.C. § 402(a) (1994) (providing for judicial review of FCC orders) and 28 U.S.C. §§ 2342, 2344 (1994) (providing for judicial review of FCC orders in a United States Court of Appeals).

B.

In response to the FCC's *Report and Order*, power companies across the country filed petitions for review in various courts of appeals. On March 23, 1998, Gulf Power Company, Alabama Power Company, Georgia Power Company, and Southern Company Services filed a joint petition for review in the Eleventh Circuit Court of Appeals. On April 28, 1998, Florida Power & Light Company also filed a petition for review in the Eleventh Circuit. Subsequently, on May 8, 1998, Tampa Electric Company filed a petition for review in the Eleventh Circuit, and Potomac Electric Company filed a petition for review in the D.C. Circuit. The same day, Virginia Electric & Power Company, Duke Energy Company, and Carolina Power & Light Company filed petitions for review in the Fourth Circuit; Duquesne Light Company and Delmarva Power & Light Company filed in the Third Circuit; American Electric Power Service Corporation filed in the Sixth Circuit; Commonwealth Edison Company filed in the Seventh Circuit; and Union Electric Company filed in the Eighth Circuit. Finally, on June 17 and July 16, 1998, respectively, Houston Lighting & Power Company and Public Service Electric & Gas Company filed motions to intervene in the first case filed in the Eleventh Circuit. Their motions were granted on August 4, 1998, the same day we granted the FCC's motion to consolidate all of the petitions for review.

In their petitions for review, the Petitioners challenge (1) the implementation of the FCC's formula for computing attachment rents as a taking without just compensation; (2) the implementation of the FCC's overlashing interpretation as a taking without just compensation; (3) the FCC's authority to include wireless communications equipment within the 1996 Act's regulated rate framework; (4) the FCC's authority to include Internet service providers within the 1996 Act's regulated rate framework; and (5) the FCC's decision not to count dark fibers as separate attachments. We discuss each of these challenges below, in parts III-VI.

On the day Gulf Power Company and its co-plaintiffs filed their joint petition for review, Gulf Power and several other utilities[19] brought an action in the United States District Court for the Northern District of Florida seeking declaratory and injunctive relief. *See Gulf Power Co. v. United States*, 998 F.Supp. 1386 (N.D.Fla.1998). Contending that the range of rental compensation the 1996 Act provided would in every case operate to deny a utility just compensation, these plaintiffs sought a declaration that the 1996 Act was facially invalid under the Fifth Amendment Takings Clause, and a permanent injunction prohibiting the Commission from enforcing the 1996 Act. *See id.* at 1389. The plaintiffs also claimed that allowing the FCC to determine just compensation violated the Separation of Powers doctrine. The district court granted the United States' motion for summary judgment. It concluded that, although the 1996 Act authorized a taking of the plain-

[19] The other utilities were Alabama Power Company, Georgia Power Company, Duke Power Company, Mississippi Power Company, Ohio Edison Company, and Florida Power Corporation.

tiffs' property, it did not deny the plaintiffs just compensation. Rather, it provided a procedure—a proceeding before the Commission—for determining just compensation which did not violate the Separation of Powers doctrine because the Commission's decision was subject to judicial review. *See id.* at 1397-98.

The plaintiff utilities appealed. A panel of this court upheld the district court's conclusion that the 1996 Act authorized a taking of the plaintiffs' property, but declined to review the court's ruling on just compensation. That issue was not ripe for review because the plaintiffs had not shown that the 1996 Act would operate to deny them just compensation in every case. *See Gulf Power Co. v. United States*, 187 F.3d 1324, 1338 (11th Cir.1999) (*Gulf Power I*). Finally, the panel affirmed the district court's holding that allowing the FCC to determine just compensation in the first instance did not violate the Separation of Powers doctrine. *Id.* at 1332-37.

II.

In their petitions for review, the Petitioners do not present the same challenges the plaintiffs made in *Gulf Power I*. Instead of attacking the facial validity of the Act under the Fifth Amendment Takings Clause and the Separation of Powers doctrine, the Petitioners question the facial validity of several aspects of the FCC's *Report and Order*.

We review constitutional challenges to agency regulations *de novo*. *See Rural Tel. Coalition v. FCC*, 838 F.2d 1307, 1313 (D.C.Cir.1988); *see also* 5 U.S.C. § 706(2)(B) (1994). We use the two-step *Chevron* analysis to review agency interpretations of a statute. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *Legal Envtl. Assistance Found., Inc. v. EPA*, 118 F.3d 1467, 1473 (11th Cir.1997). Under *Chevron* step one, we determine whether Congress has spoken unambiguously to the question at issue. If it has, our inquiry ends;

we give effect to Congress' intent. *See Chevron*, 467 U.S. at 842-43, 104 S.Ct. at 2781. Under *Chevron* step two, if we determine that Congress' intent is ambiguous, we defer to a reasonable agency interpretation of Congress' intent. *See id.* at 843, 104 S.Ct. at 2781-82. In resolving whether an ambiguity exists, we use normal tools of statutory construction, without affording agency interpretations any deference. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, 107 S.Ct. 1207, 1221, 94 L.Ed.2d 434 (1987); *National Mining Ass'n v. Secretary of Labor*, 153 F.3d 1264, 1267 (11th Cir.1998).

III.

The Petitioners' primary challenge to the FCC's *Report and Order* is that the rate formula it establishes cannot pass muster under the Fifth Amendment Takings Clause. The Petitioners' challenge presents two separate questions: will the Commission's formula, when implemented, effect a taking of part of utility poles, and if so, will the formula operate to deny the utilities just compensation in every case.

The *Gulf Power I* panel decided that the 1996 Act authorized a taking of utilities property, but concluded that the issue of whether the statute would operate to deny just compensation in every case was not ripe for review. *See Gulf Power I*, 187 F.3d at 1338; *see also Abbott Lab. v. Gardner*, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967). The panel's resolution of the takings issue constitutes binding precedent. *See Cargill v. Turpin*, 120 F.3d 1366, 1386 (11th Cir.1997). We therefore begin with the premise that the 1996 Act authorizes the Commission, when faced with a complaint filed by an entity providing cable television or telecommunications services, to take a utility's property. Thus, our answer to the first question the Petitioners pose is yes: when the Commission rules on a complaint, a taking may result.

The second question the Petitioners present is whether the Commission's formula will operate to deny utilities just com-

pensation in every case. *The Gulf Power I* panel held that the just compensation question, when raised in a facial challenge to the 1996 Act, was not ripe unless the plaintiffs could show that just compensation would be denied in all cases. The compensation limits—the maximum and minimum rents—that the Commission's rule prescribes mirror the compensation limits prescribed by the 1996 Act. *Compare* 47 U.S.C. § 224(b), (d)(1), *with* 47 C.F.R. § 1.1409. Under the 1996 Act, the lowest rent that may be considered just and reasonable is an amount equal to the incremental cost of adding the new attachment to the utility's pole; the highest rent that may be considered just and reasonable is an amount equal to the fully allocated costs of the pole. *See* 47 U.S.C. § 224(b), (d)(1). A rent that is higher or lower than these statutory limits would be unjust and unreasonable. Because the outer boundaries of the FCC's formula are identical to those of the 1996 Act, *Gulf Power I*'s ripeness standard binds us. Thus, we inquire whether the Petitioners have shown that the Commission's formula will always deny utilities just compensation.

In this case, we are not called upon to review an FCC determination that a utility provide pole space at a rent that does not amount to the just compensation mandated by the Takings Clause. All that is before us is a facial attack on the Commission's formula and the Petitioners' allegation that factors the Commission took into account in fashioning the formula could never provide just compensation. This is essentially the same argument the utilities made to the *Gulf Power I* panel. The panel's response was that the utilities failed to establish that "'no set of circumstances exists under which the Act would be valid.'" *Gulf Power I*, 187 F.3d at 1336 (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987)). Although the Petitioners posit circumstances in which the FCC's formula will deny just compensation, we are not confident, given the record at hand,

that the formula will deny just compensation in all cases. The Petitioners' facial challenge to the formula is therefore unripe, and we do not address it. *Gulf Power I*, 187 F.3d at 1338; *Cargill*, 120 F.3d at 1386.[20]

IV.

The Petitioners challenge the FCC's decision to include wireless carriers within the "nondiscriminatory access" provision of section 224(f), claiming that the FCC has no statutory authority to regulate wireless carriers under the 1996 Act.[21] We agree.

The FCC contends that Congress' frequent use of the word "any" in the 1996 Act indicates an intent to have the Commission broadly regulate pole attachments.[22] As long as an

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[20] For the same reasons, the issue of whether mandatory overlashing effects a taking without just compensation is also not ripe for review. Utilities, under the FCC's rule, are required to allow overlashing of cables for no additional compensation unless the additional cables "significantly increase the burden on the pole." *Report and Order*, 13 F.C.C.R. at 6807. This regulatory exception essentially reflects the exception, sometimes called the "engineering and safety exception," present in the Act. *See* 47 U.S.C. § 224(f)(2). That exception did not prevent the *Gulf Power I* panel from finding that the 1996 Act authorized a taking, and neither does the regulatory exception prevent us from concluding that the FCC's overlashing rule authorizes a taking. Just compensation was too abstract to determine for the original statutory taking, and thus is also too abstract to determine for the taking authorized by the FCC's overlashing rule. *See Gulf Power I*, 187 F.3d at 1338; *see also Abbott Lab.*, 387 U.S. at 148-49, 87 S.Ct. at 1515.

[21] As stated in part II *supra*, questions of pure statutory construction fall within a *Chevron* step one analysis. We therefore owe no deference to an agency's construction of a statute. *See Cardoza- Fonseca*, 480 U.S. at 446, 107 S.Ct. at 1221; *National Mining Ass'n*, 153 F.3d at 1267.

[22] Specifically, the FCC cites Congress' use of the word "any" in the following two provisions:

attachment is made by a cable television company or a telecommunications service provider, the FCC contends, the attachment may be regulated under section 224(d) or (e), no matter what kind of attachment it is. This position is contrary to the Commission's narrow authority to regulate power companies. The FCC's organic statute does not give it authority to regulate power utilities. *See* 47 U.S.C. § 151 (1994) (creating the FCC to regulate interstate and foreign commerce in radio and wire communication). Congress placed power companies within the agency's regulatory authority for pole attachment purposes only. *See* 47 U.S.C. § 224(a)(1).

Section 224(a)(4) defines a pole attachment as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." A utility, according to section 224(a)(1) is "any person . . . who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications."[23] Read in combination,

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> The term "pole attachment" means *any* attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

47 U.S.C. § 224(a)(4) (emphasis added).

> This subsection shall apply to the rate for *any* pole attachment used by a cable television system solely to provide cable service. Until the effective date of the regulations required under subsection (e) of this section, this subsection shall also apply to the rate for *any* pole attachment used by a cable system or *any* telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide *any* telecommunications service.

47 U.S.C. § 224(d)(3) (emphasis added).

[23] The term "wire communications" is defined as "the transmission of writing, signs, signals, pictures, and sounds of all kinds *by aid of wire, cable, or other like connection* between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus,

these two provisions give the FCC authority to regulate attachments to poles used, at least in part, for *wire* communications, and by negative implication does not give the FCC authority over attachments to poles for *wireless* communications.[24]

That wires are integral to the FCC's authority is supported by the legislative history of the 1978 Act.[25] Congress' reason for passing it was that the Commission did not believe it had

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and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." 47 U.S.C. § 153(51) (emphasis added).

[24] The fact that power companies that do not use their poles to transmit wire communications are not covered by the Act and the FCC's implementing regulations, *see supra* nn.12 & 23, further supports this narrow reading of the FCC's authority. The dissent takes issue with this reading of section 224, stating that we make more of the wire-based definition of utility than Congress intended. The dissent's reasoning is contrary to its own suggestion that we follow the straightforward statutory language of section 224. The language of section 224 plainly says that attachments may be made to poles used for wire communications; it says nothing about attachments for wireless communications.

[25] The statutory language of section 224 itself prohibits the FCC from regulating pole attachments for wireless communications; thus, we may end our review with that language. An understanding of the communications industry and Congress' attempts at regulating it helps one understand why Congress wrote section 224 to prohibit the FCC from regulating wireless communications. To provide this understanding, we use normal tools of statutory construction and eliminate any hint of ambiguity in the statutory language. *See Cardoza-Fonseca*, 480 U.S. at 432 n. 12, 107 S.Ct. at 1213 n. 12 ("As we have explained, the plain language of this statute appears to settle the question before us. Therefore, we look to the legislative history to determine only whether there is 'clearly expressed legislative intention' contrary to that language, which would require us to question the strong presumption that Congress expresses its intent through the language it chooses.") (quoting *United States v. James*, 478 U.S. 597, 606, 106 S.Ct. 3116, 3121, 92 L.Ed.2d 483 (1986)); *see also infra* n.39 (Carnes, J., dissenting).

authority to regulate power companies since pole attachment arrangements "d[id] not constitute communication by wire or radio." S.Rep. No.95-580, at 14, *reprinted in* 1978 U.S.C.C.A.N. at 122 (internal quotation marks omitted). The FCC reasoned that:

> The fact that cable operators ha[d] found in-place facilities convenient or even necessary for their businesses [wa]s not sufficient basis for finding that the leasing of those facilities [wa]s wire or radio communications. If such were the case, we might be called upon to regulate access and charges for use of public and private roads and right of ways essential for the laying of wire, or even access and rents for antenna sites.

Id. Before 1978, the FCC's regulatory authority did not extend to power companies because power companies did not use their poles primarily for communication by wire or radio. This hindered the growth of the cable television market. The FCC could regulate what telephone companies charged to attach, but could not regulate what the power companies charged to attach. Because telephone and power poles generally did not run side-by-side, the cable companies at times were forced to attach to power company poles instead of telephone poles, and to pay monopoly rents. To prevent the power companies from taking unfair advantage of their bottleneck facilities in this manner, Congress brought them under the FCC's regulatory umbrella, permitting "[f]ederal involvement in pole attachments matters . . . where space on a utility pole ha[d] been designated and [wa]s *actually being used for communications services by wire or cable*." *Id.* at 15, *reprinted in* 1978 U.S.C.C.A.N. at 123 (emphasis added). The reason Congress gave this pole attachment authority to the FCC was that the Commission already regulated all other aspects of the cable industry and cable companies were the only entities seeking to attach to poles in 1978.

In 1996, when Congress amended the 1978 Act, it once again expanded the FCC's jurisdiction; this time to include attachments by telecommunications service providers. Nothing in the legislative history indicates that the original purpose behind regulating utility poles—to prevent the telephone and power companies from charging monopoly rents to connect to their bottleneck[26] facilities—changed. Rather, the legislative history suggests the same thing the language alteration suggests: Congress wanted to allow telecommunications service providers, like the cable television companies before them, to attach to the utilities' bottleneck facilities without having to pay monopoly rents. *See* H. Rep. No. 104-204, at 92 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 58.

The Petitioners' poles are not bottleneck facilities for wireless carriers. Wireless attachments to poles "include an antenna or antenna clusters, a communications cabinet at the base of the pole, coaxial cables connecting antennas to the cabinet, concrete pads to support the cabinet, ground wires and trenching, and wires for telephone and electric service." *Report and Order*, 13 F.C.C.R. at 6799. Most of this equipment can be placed on any tall building, and the whole set-up requires more physical space then a wireline system. Further, wireless systems operate in a completely different way than do wireline systems. Wireline networks transmit through linear networks of cables strung between poles. Wireless networks, on the other hand, transmit through a series of concentric circle emissions that allow the network to continue working if one antenna malfunctions. Indeed, it is highly questionable whether there are any bottleneck facilities for wireless systems. What is beyond question is that utility poles are not bottleneck facilities for wireless systems.

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[26] *See AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 388, 119 S.Ct. 721, 734, 142 L.Ed.2d 835 (1999) (defining bottleneck facilities as something akin to the essential facilities of antitrust law).

Because they are not, and because the 1996 Act deals with wire and cable attachments to bottleneck facilities, the act does not provide the FCC with authority to regulate wireless carriers.[27]

Although Congress did not give the FCC authority to regulate the placement of wireless carriers' equipment under section 224 (or any other section) of the Telecommunications Act of 1996, that statute did address, in part, such regulation by state and local governments. Section 332[28] states that "[t]he regulation of the placement, construction, and modification of personal wireless services facilities by any State or local government or instrumentality thereof—shall not unreasonably discriminate among providers of functionally equivalent services; and shall not prohibit or have the effect of prohibiting the provision of personal wireless service." Pub.L. No. 104-104, § 704(B)(i)(I),(II), 110 Stat. 149 (1996) (codified at 47 U.S.C. § 332(7)(B)(i)(I), (II)). The section goes on to require a state to act on requests to site wireless equipment within a reasonable time, to require a state to put its reasons for denying any such request in writing, and to limit the reasons a state can assert for determining where wireless carriers can locate their equipment. *See id.* § 704(B)(ii)-(iv) (codified at 47 U.S.C. § 332(7)(B)(ii)-(iv)). The specificity with which Congress addressed the siting of wireless equipment in section 332 indicates that it did not in-

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[27] The FCC seemed to recognize that this might be the case when it stated that, "[t]here are potential difficulties in applying the Commission's rules to wireless pole attachments." *Report and Order*, 13 F.C.C.R. at 6799.

[28] The wireless communications section of the Telecommunications Act of 1996 follows the pole attachment section; as codified, however, the two sections do not follow one another. *Compare* Pub.L. No. 104-104, §§ 703, 704, 110 Stat. 149 (1996), *with* 47 U.S.C. §§ 224, 332 (Supp. II 1996).

tend that section 224 provide the FCC authority to regulate the placement of wireless carriers' equipment.

V.

Next, Petitioners challenge the FCC's statutory authority to regulate attachments for Internet service under the 1996 Act. As with wireless carriers, we agree that the FCC has no authority under that act to regulate Internet service providers. The 1996 Act allows the Commission to regulate the rates for cable service and telecommunications service; Internet service is neither.

The FCC argues that Internet service provided by a cable television system is either "solely cable services" or is subject to regulation under section 224(b)(1)'s mandate to "ensure that the rates, terms, and conditions [for pole attachments] are just and reasonable." *Report and Order*, 13 F.C.C.R. at 6795-96 (internal quotation marks omitted). To accept this argument requires us to disregard the unambiguous language of the 1996 Act, which we cannot do. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 340-41, 117 S.Ct. 843, 846, 136 L.Ed.2d 808 (1997). The 1996 Act calls for the Commission to establish two rates for pole attachments.[29] One, described in section 224(d), applies to "any pole attachment used by a cable television system solely to provide cable service." 47 U.S.C. § 224(d)(3). The second rate applies to "charges for pole

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[29] The dissent contends that our reading of section 224 ignores subsection (b)(1)'s mandate that the FCC provide just and reasonable rates for pole attachments. To the contrary, our reading gives effect to all parts of section 224 while the dissent's reading ignores the fact that subsections (d) and (e) narrow (b)(1)'s general mandate to set just and reasonable rates. The straightforward language of subsections (d) and (e) directs the FCC to establish two specific just and reasonable rates, one for cable television systems providing solely cable service and one for telecommunications carriers providing telecommunications service; no other rates are authorized.

attachments used by telecommunications carriers to provide telecommunications services." 47 U.S.C. § 224(e)(1). For the FCC to be able to regulate the rent for an attachment that provides Internet service then, Internet service must qualify as either a cable service or a telecommunications service.

Cable service, defined in section 522, is "the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 522(6)(A), (B) (1994 & Supp. II 1996).[30] The only difference between this definition of "cable service" and the definition included in the 1978 Act is the addition of the words "or use." According to the House Report accompanying the 1996 amendments, the inclusion of the words "or use" was meant to "reflect[ ] the evolution of video programming toward interactive services." H. Rep. No. 104-204, at 97, *reprinted in* 1996 U.S.C.C.A.N. at 64. This is the only sentence in the legislative history that attempts to explain Congress' change to the definition of "cable service." Although what it means to reflect an evolution of video programming toward interactive service is not exactly clear, it is clear from Congress' lack of discussion of this change that it was minor in both language and intent. If Congress by the addition of these two words meant to expand the scope of the "cable service" definition from its traditional video base to include all interactive services, video and non-video, it would have said so. Without any substantive comment, we will not read this minor

[30] Although section 522 states that its definitions apply only to that subchapter, we give words a consistent meaning throughout the statute unless otherwise instructed by Congress. *See Richards v. United States*, 369 U.S. 1, 11, 82 S.Ct. 585, 591-92, 7 L.Ed.2d 492 (1962) ("We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act.") (footnotes and internal quotations omitted); *Nipper v. Smith*, 39 F.3d 1494, 1515 (11th Cir.1994).

change to effectuate a major statutory shift. *See Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 318, 105 S.Ct. 3180, 3187, 87 L.Ed.2d 220 (1985) (stating that without substantive comment "it is generally held that a change during codification is not intended to alter the statute's scope") (citing *Muniz v. Hoffman*, 422 U.S. 454, 467-74, 95 S.Ct. 2178, 2185-89, 45 L.Ed.2d 319 (1975)). How then did the addition of the words "or use" alter the definition of "cable service"? The statute's plain language and Congress' one sentence explanation suggest that Congress expanded the definition to include services that cable television companies offer to their customers to allow them to interact with traditional video programming.[31]

Although the statute includes interaction with other programming—in addition to video programming—within the definition of "cable service," we cannot read the language "other programming" broadly to include Internet services. "Other programming" has been part of the definition of "cable service" since 1978, when the Internet was only a tool for researchers and the military, not a commodity that would require regulation. When Congress used this language then, it could not have intended it to cover Internet services provided by cable companies. Again, we will not radically expand the scope of the definition of "cable service" from a video base to an all-interactive-services base without some substantive indication from Congress that this is indeed its intent. *See Walters*, 473 U.S. at 318, 105 S.Ct. at 3187.[32]

[31] Video programming means "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(20).

[32] The Commission urges us to adopt the D.C. Circuit's reasoning in *Texas Utilities Electric Co. v. FCC*, 997 F.2d 925 (D.C.Cir.1993), in determining whether pole attachments used by a cable television company to provide Internet service are entitled to a regulated rent under the 1996

Furthermore, as an aside, we note that the FCC, itself, has defined the Internet as an information service, not as a cable service. *See In Re Fed.-State Joint Bd. on Universal Serv.*, 13 F.C.C.R. 11501 ¶ 66, 1998 WL 166178 ("Internet service providers themselves provide information services. . . ."). Thus, the FCC lacks statutory authority to regulate the Internet under the 1996 Act based on the theory that Internet service is a cable service.

The only remaining basis for the Commission's authority to regulate the Internet under the 1996 Act is to treat the Internet as a telecommunications service. *See* 47 U.S.C. § 224(d)(3), (e) (directing the Commission to develop a rate for telecommunications carriers providing telecommunications service). The FCC, however, did not raise that argument before us. Nor could it have because the FCC has specifically

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Act. We decline to do so. The D.C. Circuit decided *Texas Utilities Electric Co.* before the 1996 amendments were enacted. Prior to 1996, section 224 instructed the FCC to set a reasonable rent for "any attachment by a cable television system." 47 U.S.C. § 224(a)(4), (d)(1) (1994). It did not specify the particular services of a cable television system that were entitled to a regulated rent. Because Congress, in passing the 1978 Act, did not specify whether it "place[d] greater emphasis on the type of service to be distributed over the attachment or the type of entity doing the attaching," *Texas Utils. Elec. Co.*, 997 F.2d at 930, the court found the statute ambiguous. The court, therefore, deferred to the FCC's interpretation that co-mingled services were covered by section 224. Today we are faced with an entirely different situation from that faced by the D.C. Circuit in *Texas Utilities Electric Co.* because Congress, in 1996, amended the Act to eliminate the ambiguity at issue in that case. The new section 224(d)(3) states that "solely cable services" receive regulated rents. (Telecommunications services, which also receive regulated rents are discussed in the text *infra*.) Because we now know that the statute emphasizes the type of service over the type of entity acquiring the attachment, we have no need to follow the reasoning of *Texas Utilities Electric Co.* Indeed, to follow that reasoning would be to disregard our duty under *Chevron* to give effect to Congress' unambiguous intent. *Chevron*, 467 U.S. at 842-43, 104 S.Ct. at 2781.

said that the Internet is not a telecommunications service. *See Report and Order*, 13 F.C.C.R. at 6795 ("The *Universal Service Order* concluded that Internet service is not the provision of a telecommunications service under the 1996 Act."); *In Re Fed.-State Joint Bd. on Universal Serv.*, 12 F.C.C.R. 87 ¶ 69 (1996) ("Internet service does not meet the statutory definition of a 'telecommunications service.' ").[33] Accordingly, there is no statutory basis for the FCC to regulate the Internet as a telecommunications service under the 1996 Act.

In sum, Congress, in the 1996 Act, authorized the FCC to develop rent formulas for attachments providing cable and telecommunications services. Internet service does not meet the definition of either a cable service or a telecommunications service. Therefore, the 1996 Act does not authorize the FCC to regulate pole attachments for Internet service.

VI.

The Petitioners' final challenge is to the FCC's statutory authority to regulate the rents utilities charge for dark fiber attachments. Dark fiber, which exists within a fiber optic cable, "consists of . . . bare capacity and does not involve any of the electronics necessary to transmit or receive signals over that capacity." *Report and Order*, 13 F.C.C.R. at 6810. The advantage of stringing cables with lit and dark fiber is that dark fiber provides excess distribution and transmittal capacity for a cable or telecommunications company to use as its

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[33] The FCC has given the following examples of telecommunications services: cellular telephone and paging services; mobile radio services; operator services; PCS (personal communications services); access to interexchange service; special access; wide area telephone service (WATS); toll-free service; 900 service; MTS; private line; telex; telegraph; video services; satellite services; and resale services. *In re Fed.-State Joint Bd. on Universal Serv.*, 12 F.C.C.R. 8776 ¶ 780 (1997). Even if this list is not exhaustive, all of these examples are materially different from the Internet.

service network expands. Dark fiber also may be leased to a third party. Because dark fiber is bare capacity, it technically is neither a telecommunications service nor a cable service. In fact, it is not a service at all; it is simply an inactive fiber.

The 1996 Act authorizes the FCC to regulate the pole attachments of cable television and telecommunications companies that provide cable and telecommunications services. *See* 47 U.S.C. § 224; *supra* part V. The 1996 Act says nothing about regulating bare capacity. But, these bare capacity fibers do not generally exist on their own. They are usually located within cables that also contain fibers providing cable or telecommunications services, i.e., lit fibers the FCC clearly has the authority to regulate. Thus, unlike Internet service or wireless carriers, the statute's silence does not resolve the issue of whether the Commission may regulate dark fiber. Both Internet service and wireless carriers are similar to items the statute covers. The statute defines the kinds of attachers it covers, and wireless carriers do not fall within that definition. Similarly, the statute defines the types of wire services it covers, and Internet services are not one of those services. We can, therefore, say, based on the 1996 Act alone, that the FCC lacks the authority to regulate wireless carriers and the provision of Internet services. Dark fiber, however, is not a service (nor, of course, is it a type of attacher). Thus, the fact that it falls outside the definitions of "cable service" and "telecommunications service" tells us nothing about Congress' intent to regulate dark fiber. Congress did say that it did not intend to have an attacher pay twice for a single attachment, *see* H.R.Rep. No. 104-204, at 92, *reprinted in* 1996 U.S.C.C.A.N. at 59, but the legislative history does not indicate whether dark fiber and its host were to be considered a single attachment. Congress' intent is ambiguous; therefore, we proceed to step two of the *Chevron* analytical framework and consider whether the FCC reasonably interpreted Congress' silence on

dark fiber. *See Chevron*, 467 U.S. at 843, 104 S.Ct. at 2781-82.[34]

The FCC decided that dark fiber is not a separate attaching entity from its host attachment. *See Report and Order, 13* F.C.C.R. at 6811.[35] According to the FCC, dark fibers place no more burden on a pole than do their host attachments. *See id.* This makes sense since dark fiber, by definition, is merely bare capacity and is included within its host attachment at the time that cable is attached to the pole. Further, we presume that in determining the rent for the host attachment, the utility and the FCC will account for the dark fibers contained within the attaching host. By accounting for the dark fibers in the rent determination for the host cable, the Commission ensures that the utility receives just compensation for any burden the dark fiber may cause the pole at the time the host attaches. Hence, once the utility has been compensated, there is no reason to treat dark fiber as a separate attaching entity, and the FCC's decision not to do so is reasonable.[36]

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[34] Our conclusion that Congress' intent is ambiguous is consistent with our conclusion that section 224 does not authorize the FCC to regulate wireless carriers or the provision of Internet services because, as we state in the text, wireless carriers and Internet service are similar in kind to the attachers and services the 1996 Act discusses. Dark fiber, however, is a different bird altogether. Neither the statute nor the legislative history discusses anything similar to dark fiber. Therefore, we cannot even begin to discern, let alone declare unambiguous, Congress' intent regarding dark fiber.

[35] Section 224(e)(2) directs a utility to "apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities," and section 224(e)(3) directs a utility to "apportion the cost of providing usable space among all entities." The FCC determined that dark fiber did not constitute a separate entity from its host attacher for purposes of sections 224(e)(2) and (3).

[36] Our ruling on dark fiber is narrow; holding only that it was reasonable for the FCC to consider pure dark fiber and its host as one attaching entity. We are not presented with a factual scenario involving dark fiber

VII.

For the foregoing reasons, we hold that the nondiscriminatory access provision of the 1996 Act authorizes a taking of a portion of the Petitioners' poles, which occurs when the FCC issues a rent determination order as to a particular pole or set of poles. Whether the rent formula developed by the FCC, including its decision not to require additional compensation for overlashed wires, provides just compensation is not ripe for review because it is not presented in a sufficiently concrete form for adjudication. Further, we hold that the FCC lacks the authority to regulate wireless carriers and the provision of Internet service under the 1996 Act. Finally, we hold that the FCC's decision not to count leased dark fiber as an additional attaching entity is reasonable.

SO ORDERED.

CARNES, Circuit Judge, concurring in part and dissenting in part:

On review in these cases is *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 F.C.C.R. 6777, 1998 WL 46987 (1998) ("*Order*"), the order of the Federal Communications Commission which implements the amendments to the Pole Attachment Act of 1978, 47 U.S.C. § 224, contained in the Telecommunications Act of 1996. Because I believe that the Pole Attachment Act of 1978, as amended, extends regulated rates to all pole attachments, including those used for wireless telecommunications service and Internet service, I dissent from the parts of the Court's decision reaching a contrary conclusion.

I do agree with the majority opinion's conclusions regarding the petitioners' facial attack on the rate formula prescribed in the *Order*. As this Court held in *Gulf Power Co. et*

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that becomes lit, thus we do not address the status of such a fiber. Nor do we address dark fiber located within a cable whose attachment the FCC lacks authority to regulate under section 224(f).

al. v. United States, 187 F.3d 1324 (11th Cir.1999) ("*Gulf Power I*"), section 224(f), the statutory provision requiring utilities to accept pole attachments, effects a per se taking of property under the Fifth Amendment for which just compensation is required.[1] *Id.* at 1328-31. But the petitioners have failed to show that the *Order*'s rate formula will deny just compensation in every case. Consequently, their facial challenge to the formula is unripe and, as the majority opinion concludes, it should not be considered by this Court.[2] *Id.*

I disagree, however, with the majority opinion's holdings regarding wireless telecommunications service and Internet service. It concludes that the FCC has no authority to regulate either wireless telecommunications carriers or Internet service providers, but the plain language of the statute mandates the opposite conclusion.[3]

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[1] Section 224(f) reads as follows:

> (1) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to pole, conduit, or right-of-way owned or controlled by it.
>
> (2) Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

[2] Likewise, I agree with the majority opinion's conclusion regarding the petitioners' argument that the rate formula denies just compensation when wires are overlashed because no additional compensation is awarded. It is possible that in some cases the rate formula will provide just compensation for both the original attachment and the overlashed cables without additional compensation. Again, the petitioners have failed to show that the rate formula will deny just compensation in every case. Thus, their challenge is unripe.

[3] As noted in the majority opinion, we apply the two-step *Chevron* analysis to agency interpretations of a statute. *See Chevron U.S.A., Inc. v.*

Section 224(b)(1) provides that the FCC "shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." The term "pole attachment" is defined in section 224(a)(4) as "*any* attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." (emphasis added). As this Court has stated, more than once, "the adjective 'any' is not ambiguous; it has a well- established meaning." *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1186 (11th Cir.1997); *accord Lyes v. City of Riviera Beach, Florida*, 166 F.3d 1332, 1337 (11th Cir.1999) (en banc). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.' " *United States v. Gonzales*, 520 U.S. 1, 5, 117 S.Ct. 1032, 1035, 137 L.Ed.2d 132 (1997) (citations omitted) (as quoted in *Merritt*, 120 F.3d at 1186). Applying that definition to sections 224(a)(4) and (b)(1), the FCC has the authority to regulate *all* attachments, i.e., attachments "of whatever kind," *id.*, by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility. Obviously, *all* attachments includes those attachments used to provide wireless and Internet services.

The majority opinion does not attempt to justify its conclusions regarding wireless service with the language of the stat-

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Natural Resources Defense Council, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). "First, the court is to determine if the intent of Congress is clear; if so, that is the end of the matter. On the other hand, if Congress has not spoken directly to the precise question at issue, a second step of review comes into play, and the court must determine whether the agency's answer to the question Congress left open reflects a permissible construction of the statute." *Jaramillo v. INS*, 1 F.3d 1149, 1152 (11th Cir.1993) (en banc). We use the normal tools of statutory construction to judge whether Congress' intent is clear. *See INS v. Cardoza Fonseca*, 480 U.S. 421, 446, 107 S.Ct. 1207, 1221, 94 L.Ed.2d 434 (1987) (quoting *Chevron*, 467 U.S. at 843 n. 9, 104 S.Ct. at 2782 n. 9).

ute, except to say that there is a "negative implication" created by the statutory definition of a pole attachment coupled with the definition of a utility.[4] But the negative implication, if there is one at all, is not nearly as strong as the majority seems to think. The statutory definition of utility serves merely to exempt from mandatory access any utility that does not make its poles available for wire communications at all. If a utility does not make its poles available for wire communications, it does not have to make its poles available for wireless communications. However, once a utility makes its poles available, even "in part," for wire communications, it is subject to mandatory access for all pole attachments. Nothing about the definition of utility negates the FCC's mandate to regulate rates for all pole attachments.

Notwithstanding the straightforward statutory language, the majority opinion turns to legislative history to justify its conclusion about wireless communications. But the Supreme Court, as well as this Court, has repeatedly held when the meaning of a statute is clear from its plain language, it is unnecessary to look to legislative history. *See Gonzales*, 520 U.S. at 6, 117 S.Ct. at 1035 ("Given the straightforward statutory command, there is no reason to resort to legislative history."); *Ratzlaf v. United States*, 510 U.S. 135, 147-48, 114 S.Ct. 655, 662, 126 L.Ed.2d 615 (1994) ("we do not resort to legislative history to cloud a statutory text that is clear"); *United States v. Paradies*, 98 F.3d 1266, 1288 (11th Cir.1996) ("Because the language in the statute is clear, it would be improper to look to the legislative history for clarification."). Because the statutory language at issue is unambi-

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[4] Pole attachment is defined in section 224(a)(4) as "any attachment . . . to a pole, duct, conduit, or right-of-way owned or controlled by a utility." Utility is defined in section 224(a)(1) as "any person . . . who owns or controls poles, ducts, conduits, or rights-of- way used, in whole or in part, for any wire communications."

guous, resort to legislative history in order to undermine it is unnecessary and improper.

With respect to Internet service, the majority opinion concludes that the FCC has no authority to regulate it because Internet service is neither a cable service nor a telecommunications service, and is thus not covered by the rate formulas described in section 224(d) for "solely" cable services and in section 224(e) for telecommunications services. But the majority opinion fails to address the section 224(b)(1) mandate that the FCC "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable. . . ." Because pole attachment is defined as "any attachment," and because of the unambiguous definition of "any," section 224(b)(1) requires the FCC to ensure just and reasonable rates for all pole attachments, including those used to provide Internet service.

Finally, I agree with the majority opinion's conclusion that the FCC has the authority to regulate dark fiber and that the FCC's decision not to treat dark fiber as a separate attaching entity is reasonable. For reasons I have already discussed, dark fiber is within the definition of pole attachment, and it is therefore within the FCC's regulatory authority. The FCC's decision to treat dark fiber and its host attachment as one attaching entity is reasonable, because, as the majority opinion notes, "dark fiber, by definition, is merely bare capacity and is included within its host attachment at the time that cable is attached to the pole."

The problem is how the majority opinion reaches the conclusion that the FCC is authorized to regulate dark fiber. It does so by concluding that because dark fiber is neither a cable service nor a telecommunications service, the statute is ambiguous. But the same majority opinion also concludes that because Internet service is neither a cable service nor a telecommunications service, the statute is unambiguous and Internet service is outside the FCC's regulatory authority.

The majority cannot have it both ways—either the statute unambiguously gives the FCC the authority to regulate only cable and telecommunications services, or the statute is ambiguous about whether the FCC has authority to regulate more than cable and telecommunications services. My view is consistent: The statute unambiguously gives the FCC authority to regulate any and all pole attachments. The majority opinion's view is not consistent.

Because I believe that the statute unambiguously gives the FCC regulatory authority over wireless telecommunications service and Internet service, I dissent from those parts of the majority opinion holding to the contrary.

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

CS Docket No. 97-151

IN THE MATTER OF

IMPLEMENTATION OF SECTION 703(E)
OF THE TELECOMMUNICATIONS ACT OF 1996
AMENDMENT OF THE COMMISSION'S RULES
AND POLICIES GOVERNING POLE ATTACHMENTS

REPORT AND ORDER

Adopted: February 6, 1998 Released: February 6, 1998
By the Commission:

[¶¶1-35]

* * * *

I. INTRODUCTION

1. In this *Report and Order* ("*Order*"), the Commission adopts rules implementing Section 703 of the Telecommunications Act of 1996 ("1996 Act")[1] relating to pole attachments.[2] Section 703 requires the Commission to

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[1] Pub. L. No. 104-104, 110 Stat. 61, 149-151, codified at 47 U.S.C. § 224.

[2] Section 703 amended Section 224 of the Communications Act. Currently Section 224 defines "pole attachment" as any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit or right-of-way owned or controlled by a utility. 47 U.S.C. § 224(a)(4). Section 224 defines "utility" as any person who is a local exchange carrier or an electric, gas, water, steam or other public utility, and who owns or controls poles, ducts, conduits or rights-of-way used, in whole or in part, for any wire communications, not including any railroad, any person who is cooperatively organized, or any person owned by the federal government or any state. 47 U.S.C. § 224(a)(1).

prescribe regulations to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services.[3] Section 703 also requires that the Commission's regulations ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.[4] We adopt the rules set forth in Appendix A hereto based upon the comments and reply comments filed in response to the *Notice of Proposed Rulemaking* in this docket (the "*Notice*").[5] A list of commenters, as well as the abbreviations used in this *Order* to refer to such parties, is contained in Appendix B hereto. The commenters generally represent the interests of one of the following three categories: (1) utility pole owners;[6] (2) cable operators;[7] and (3) telecommunications carriers.[8]

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[3] 47 U.S.C. § 224(e)(1).

[4] *Id.*

[5] *Notice of Proposed Rulemaking*, CS Docket No. 97-151, 12 FCC Rcd 11725 (1997). In addition, to the extent relevant, we have considered the comments and reply comments filed in response to the *Notice of Proposed Rulemaking* in CS Docket No. 97-98 relating to the existing formula for pole attachments. *Notice of Proposed Rulemaking*, CS Docket No. 97-98 (Amendment of Rules and Policies Governing Pole Attachments), 12 FCC Rcd 7449 (1997) ("*Pole Attachment Fee Notice*"). The *Pole Attachment Fee Notice* specifically seeks comment on the Commission's use of the current presumptions, on carrying charge and rate of return elements of the formula, on the use of gross versus net data and on a conduit methodology.

[6] Commenting utility pole owners generally include American Electric, et al., Carolina Power, et al., Colorado Springs Utilities, New York State Investor Owned Electric Utilities, Dayton Power, Duquesne Light, Edison Electric/UTC, Ohio Edison, Texas Utilities and Union Electric.

[7] Commenting cable operator interests generally include Adelphia, et al., New York Cable Television Assn., Comcast, et al., NCTA, SCBA and Summit.

[8] Commenting telecommunications carrier interests generally include Ameritech, AT&T, Bell Atlantic, BellSouth, Champlain Valley Telecom,

II. BACKGROUND

2. The purpose of Section 224 of the Communications Act[9] is to ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers.[10] The rules we adopt in this *Order* further the pro-competitive goals of Section 224 and the 1996 Act by giving incumbents and new entrants in the telecommunications market fair and non-discriminatory access to poles and other facilities, while safeguarding the interests of the owners of those facilities.

3. As originally enacted, Section 224 was designed to ensure that utilities' control over poles and rights-of-way did not create a bottleneck that would stifle the growth of cable television. Congress sought to prohibit utilities from engaging in "unfair pole attachment practices . . . and to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public."[11] As mandated by Section 224, the Commission established a formula to calculate maximum rates that utilities could charge cable operators for the installation of attachments on utility facilities where such rates are not regulated by a state.[12] In subsequent

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et al., GTE, ICG Communications, KMC Telecom, MCI, Omnipoint, RCN, SBC, Sprint, Teligent, USTA, U S West and Winstar.

[9] Pub. L. No. 95-234 ("1978 Pole Attachment Act") codified at Communications Act of 1934, as amended ("Communications Act"), § 224, 47 U.S.C. § 224.

[10] S. Rep. No. 580, 95th Cong., 1st Sess. 19, 20 (1977) ("*1977 Senate Report*"), *reprinted in* 1978 U.S.C.C.A.N. 109, 121.

[11] *Id.*

[12] *First Report and Order* (Adoption of Rules for the Regulation of Cable Television Pole Attachments), CC Docket No. 78-144, 68 FCC 2d

proceedings the Commission amended and clarified its methodology for establishing rates and its complaint process.[13]

4. The 1996 Act amended Section 224 in several important respects. While previously the protections of Section 224 had applied only to cable operators, the 1996 Act extended those protections to telecommunications carriers as well.[14] Further, the 1996 Act gave cable operators and telecommunications carriers a mandatory right of access to utility poles, in addition to maintaining a scheme of rate regulation governing such attachments.[15] In the *Local Competition Order*, we adopted a number of rules implementing the new access provisions of Section 224.[16]

1585 (1978) ("*First Report and Order*"); *see also Second Report and Order*, 72 FCC 2d 59 (1979) ("*Second Report and Order*"); *Third Report and Order*, 77 FCC 2d 187 (1980) ("*Third Report and Order*"), *aff'd Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1985) (per curiam); *Report and Order*, CC Docket No. 86-212 (Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles), 2 FCC Rcd 4387, 4387-4407 (1987) ("*Pole Attachment Order*"), *recon. denied*, 4 FCC Rcd 468 (1989).

[13] *Second Report and Order*, 72 FCC 2d 59; *Memorandum Opinion and Order* (Petition to Adopt Rules Concerning Usable Space on Utility Poles, RM 4556), FCC 84-325 (released July 25, 1984) ("*Usable Space Order*"); *see also Alabama Power Co. v. FCC*, 773 F.2d 362 (D.C. Cir. 1985) (upholding challenge to the Commission's pole attachment formula relating to net pole investment and carrying charges). Following *Alabama Power*, the Commission revised its rules in the *Pole Attachment Order*, 2 FCC Rcd 4387.

[14] 47 U.S.C. § 224.

[15] 47 U.S.C. § 224(a), (f).

[16] *First Report and Order*, CC Docket No. 96-98 (Implementation of the Local Competition Provisions in the Telecommunications Act of 1996), 11 FCC Rcd 15499, 16058-107, paras. 1119-1240 (1996) (the "*Local Competition Order*"), *rev'd on other grounds, Iowa Utilities Board*

5. As amended by the 1996 Act, Section 224 defines a utility as one "who is a local exchange carrier or an electric, gas, water, steam, or other public utility and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communications." [17] The 1996 Act, however, specifically excluded incumbent local exchange carriers ("ILECs") from the definition of telecommunications carriers with rights as pole attachers.[18] Because, for purposes of Section 224, an ILEC is a utility but is not a telecommunications carrier, an ILEC must grant other telecommunications carriers and cable operators access to its poles, even though the ILEC has no rights under Section 224 with respect to the poles of other utilities. This is consistent with Congress' intent that Section 224 promote competition by ensuring the availability of access to new telecommunications entrants.[19]

6. Section 224 contains two separate provisions governing maximum rates for pole attachments, one of which covers attachments used to provide cable service and one of which covers attachments for telecommunications services (including attachments used jointly for cable and telecom-

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v. FCC, 120 F.3d 753 (8th Cir. 1997), *cert. granted sub nom., AT&T Corp. v. Iowa Utilities Board*, 66 U.S.L.W. 3387, 66 U.S.L.W. 3484, 66 U.S.L.W. 3490 (U.S. Jan. 26, 1998) (No. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 97-1411). In August 1996, the Commission also issued a *Report and Order* in CS Docket No. 96-166 (Implementation of Section 703 of the Telecommunications Act of 1996), 11 FCC Rcd 9541 (1996), amending its rules to reflect the self-effectuating additions and revisions to Section 224.

[17] 47 U.S.C. § 224(a).

[18] 47 U.S.C. § 224(a)(5).

[19] *Conference Report to S. 652 and Joint Explanatory Statement of the Committee of Conference*, 104th Cong., 2d Sess. 98-100, 113 ("*Conf. Rpt.*").

munications). Section 224(b)(1), which was not amended by the 1996 Act, grants the Commission authority to regulate the rates, terms, and conditions governing pole attachments for cable service to ensure that they are just and reasonable.[20] Section 224(d)(1) defines a just and reasonable rate as ranging from the statutory minimum (incremental costs) to the statutory maximum (fully allocated costs).[21] Incremental costs include pre-construction survey, engineering, make-ready and change-out costs incurred in preparing for cable attachments.[22] Fully allocated costs refer to the portion of operating expenses and capital costs that a utility incurs in owning and maintaining poles that is equal to the portion of usable pole space that is occupied by an attacher.[23]

7. Separately, Section 224(e)(1), the subject of this *Order*, governs rates for pole attachments used in the provision of

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[20] *Cf.* 47 U.S.C. § 224(c)(1). The Commission does not have authority where a state regulates pole attachment rates, terms, and conditions. Section 224(c)(3) directs that jurisdiction for pole attachments reverts to the Commission generally if the state has not issued and made effective rules implementing the state's regulatory authority over pole attachments. Reversion to the Commission also occurs, with respect to individual cases, if the state does not take final action on a complaint within 180 days after its filing with the state, or within the applicable period prescribed for such final action in the state's rules, as long as that prescribed period does not extend more than 360 days beyond the complaint's filing. 47 U.S.C. § 224(c)(3).

[21] 47 U.S.C. § 224(d)(1).

[22] "Make-ready" generally refers to the modification of poles or lines or the installation of guys and anchors to accommodate additional facilities. *See 1977 Senate Report* at 19. A pole "change-out" is the replacement of a pole to accommodate additional users. *Pole Attachment Order*, 2 FCC Rcd at 4405 n.3. Congress expected pole attachment rates based on incremental costs to be low because utilities generally recover the make-ready or change-out charges directly from cable systems. *See 1977 Senate Report* at 19.

[23] *Id.* at 19-20.

telecommunications services, including single attachments used jointly to provide both cable and telecommunications service. Under this section, the Commission must prescribe, no later than two years after the date of enactment of the 1996 Act, regulations "to govern charges for pole attachments used by telecommunication carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges." [24] Section 224(e)(1) states that such regulations "shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for such pole attachments." [25] The section also sets forth a transition schedule for implementation of the new rate formula for telecommunications carriers. Until the effective date of the new formula governing telecommunications attachments, the existing pole attachment rate methodology of cable services is applicable to both cable television systems and to telecommunications carriers.[26]

8. In the *Notice*, the Commission sought comment on implementing a methodology to ensure just, reasonable, and nondiscriminatory maximum pole attachment and conduit [27] rates for telecommunications carriers.[28] Under the present

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[24] 47 U.S.C. § 224(e)(1). The 1996 Act was enacted on February 8, 1996.

[25] *Id.*

[26] 47 U.S.C. § 224(d)(3); 47 C.F.R. § 1.1401. Pursuant to Section 224(d)(3), the current formula will continue to be applicable to cable systems providing only cable service and, until February 8, 2001, to cable systems and telecommunications carriers providing telecommunications services. See Section VI below regarding the implementation and the effective date of the rules we adopt herein.

[27] A conduit is a pipe placed in the ground through which cables are pulled. FCC ARMIS Operating Data Report, FCC Report 43-08 (January 1992).

[28] *Notice*, 12 FCC Rcd at 11739-40, paras. 36-41.

formula, a portion of the total annual cost of a pole is included in the pole attachment rate based on the portion of the usable space occupied by the attaching entity.[29] Under the 1996 Act's amendments, the portion of the total annual cost included in the pole attachment rate for cable systems and telecommunications carriers providing telecommunications services will be determined under a more delineated method. This method allocates the costs of the portion of the total pole cost associated with the usable portion of the pole and the portion of the total pole cost associated with the unusable portion of the pole in a different manner. The Commission also sought comment on how to ensure that rates charged for use of rights-of-way are just, reasonable, and nondiscriminatory.[30]

9. The rules we adopt today implement the plain language of Section 224. That section provides that the regulations promulgated will apply "when the parties fail to resolve a dispute over such charges." [31] Accordingly, and as discussed below, we encourage parties to negotiate the rates, terms, and conditions of pole attachment agreements. Although the Commission's rules will serve as a backdrop to such negotiations, we intend the Commission's enforcement mechanisms to be utilized only when good faith negotiations fail. Based on the Commission's history of successful implementation and enforcement of rules governing attachments used to provide cable service, we believe that the new rules we adopt today will foster competition in the provision of communications services while guaranteeing fair compensation for the utilities that own the infrastructure upon which such competition depends.

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[29] *See Third Report and Order*, 77 FCC 2d 187 (1980).

[30] *Notice*, 12 FCC Rcd at 11740, paras. 42-43.

[31] 47 U.S.C. § 224(e)(1).

III. PREFERENCE FOR NEGOTIATED AGREEMENTS AND COMPLAINT RESOLUTION PROCEDURES

A. *Background*

10. The 1996 Act amended Section 224 by adding a new subsection (e)(1) to:

> . . . govern the charges for pole attachments used by telecommunications providers to provide telecommunications services when the parties fail to resolve a dispute over such charges. Such regulations shall ensure that a utility charges just, reasonable and nondiscriminatory rates for pole attachments.[32]

The statute, [33] legislative policy, [34] administrative authority, [35] and current industry practices [36] all make private negotiation the preferred means by which pole attachment arrangements are agreed upon between a utility pole owner and an attaching entity.[37] Pursuant to the Commission's authority to provide

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[32] 47 U.S.C. § 224(e)(1).

[33] 47 U.S.C. §§ 224(b)(1), (d)(1), (e)(1).

[34] *1977 Senate Report* at 19-20; *Conf. Rpt.* at 205-207.

[35] *First Report and Order*, 68 FCC 2d 1585 (setting initial rules for the complaint process, formula elements and the use of historical costs); *Second Report and Order*, 72 FCC 2d 59 (setting spatial presumptions and defined incremental and fully allocated costs for use in formula); *Third Report and Order*, 72 FCC 2d 187, *aff'd Monongahela Power Co. v. FCC*, 655 F.2d 1254; *Pole Attachment Order*, 2 FCC Rcd 4387, *recon. denied*, 4 FCC Rcd 468.

[36] *See, e.g.*, Carolina Power, et al., Comments at 11; NCTA Comments at 4-7; USTA Reply at 2.

[37] From 1979, when the first pole attachment complaint was filed with the Commission, to 1991, approximately 246 pole attachment complaints were filed. From 1991 through 1996, approximately 44 such complaints were filed. Currently, there are seven pole attachment complaints under review by the Commission's Cable Services Bureau. We view this

for just, reasonable, and nondiscriminatory rates, terms and conditions for pole attachments,[38] attaching entities have recourse to the Commission when unable to resolve a dispute with a utility pole owner. The Commission's rules establish a specific complaint process.[39] Under the current rule, in reviewing a complaint about rates, the Commission will compare the utility's proposed rate to a maximum rate calculated using the statutory formula.[40]

11. In proposing a methodology to implement Section 224(e), the Commission stated in the *Notice* that the Commission's role is limited to circumstances when the parties fail to resolve a dispute and that negotiations between a utility and an attacher should continue to be the primary means by which pole attachment issues are resolved.[41] The Commission also indicated that Congress recognized the importance of access in enhancing competition in telecommunications markets and that parties in a pole attachment negotiation do not have equal bargaining positions.[42] To further Congressional intent to foster competition in telecommunications, the Commission proposed to apply to telecommunications carriers the Commission's existing complaint rules developed to resolve pole attachment rate disputes between cable operators and utilities.[43]

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number of complaints to the Commission, in light of the penetration of cable service in the nation's communities, to be indicative that most pole attachment rates are negotiated without resort to the Commission.

[38] 47 U.S.C. §§ 224(b)(1), (e)(1), (f)(1).

[39] 47 C.F.R. §§ 1.1401-1.1416.

[40] 47 U.S.C. § 224(d)(1).

[41] *Notice*, 12 FCC Rcd at 11731, para. 12.

[42] *Id.*

[43] *Id.* The current complaint rule provides that "[t]he complaint shall include a brief summary of all steps taken to resolve the problem prior to

12. Some telecommunications carriers and utility pole owners agree that negotiations between a utility and an attaching entity will continue, under Section 224(e), to be the primary means by which pole attachment issues are resolved.[44] Several utility pole owners, however, suggest a number of changes to the complaint process, such as adding a mandatory negotiation period and establishing a statute of limitations and a minimum amount in controversy.[45] American Electric, et al., also contend that meaningful negotiations can occur "only when the default pricing mechanism established by the Commission is somewhere close to the price on which the parties would agree absent such regulation."[46] Attaching entities respond that the American Electric, et al., proposals would eliminate recourse to the Commission, contrary to the content and spirit of the law.[47]

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filing. If no such steps were taken, the complaint shall state the reason(s) why it believed such steps were fruitless." 47 C.F.R. § 1.1404(i).

[44] *See* Bell Atlantic Reply at 2 (negotiation is essential means to establish just and reasonable rates for pole attachments); Carolina Power, et al., Reply at 11 (private negotiations are the cornerstone of attachment agreements); GTE Comments at 4-5; USTA Reply at 2. *But see* MCI Comments at 2 (formula for maximum rate is a necessary condition to making negotiations, and therefore industry resolution of disputes, possible at all).

[45] *See* American Electric, et al., Reply at 30; Carolina Power, et al., Comments at 18-19; Duquesne Light Comments at 18-20; Edison Electric/UTC Comments at 7; GTE Reply at 4-5; USTA Comments at 2.

[46] American Electric, et al., Comments at 12-13. American Electric, et al., believe that any default pricing formula established pursuant to Section 224(e) should be based on Forward-Looking Economic Pricing Model based on economic capital costs. American Electric, et al., Comments at 13,39 and CS Docket No. 97-98 Comments at 4, 42-46, 91-94.

[47] *See, e.g.*, NCTA Reply at 4; *see also* Association for Local Telecommunications Services CS Docket No. 97-98 Comments at 2; USTA CS Docket No. 97-98 Reply at 6.

13. The Association of Local Telecommunications Services ("ALTS")[48] asserted in its comments in response to the *Pole Attachment Fee Notice* that its members have experience attempting to obtain pole attachments from numerous utilities,[49] and many negotiations were unsatisfactory in part due to the intransigence by or blatant refusal of utilities to negotiate.[50] USTA, a national trade association representing over 1,000 LECs,[51] contends that while the most efficient manner to determine just and reasonable pole attachment rates is that of permitting pole owners and attachers to negotiate reasonable agreements,[52] the proposal by American Electric, et al., contravenes the statute.[53]

14. Electric utility pole owners oppose the continued use of the current negotiation process and complaint procedures established for cable operators, claiming the current regulatory scheme has resulted in government-sponsored unilateral contract modification and subsidization of the cable industry by the electric utility ratepayer.[54] American Electric, et al., contend that the Commission must recognize that the bargaining relationship between electric utilities and cable companies has changed since 1978 when Congress provided the cable television industry with access to the distribution

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[48] ALTS is a national trade association representing over 30 telecommunications carriers that are facilities based competitive local exchange carriers ("CLECs"). ALTS CS Docket No. 97-98 Comments at 1.

[49] ALTS CS Docket No. 97-98 Comments at 2.

[50] *Id.*

[51] USTA Comments at 1.

[52] USTA CS Docket No. 97-98 Comments at 2.

[53] USTA CS Docket No. 97-98 Reply at 5-6.

[54] *See, e.g.*, American Electric, et al., Comments at 18-20.

poles of utilities at just and reasonable rates.[55] In asserting that attaching entities no longer represent an industry that needs rate regulation under Section 224,[56] American Electric, et al., acknowledge that in 1978 "Congress was concerned with the cable companies' inferior bargaining position vis-a-vis utilities and wanted to assist an industry in its infancy."[57] USTA interprets Congressional intent as expecting the Commission to intervene and rely on the statutory formula only in instances where negotiating parties are unable to reach a mutually acceptable agreement.[58] USTA further states that the Commission has established and maintained a case-by-case dispute resolution process since 1978, rather than adopting a uniform pole attachment rate prescription process in compliance with that Congressional mandate.[59] Cable and telecommunications carriers assert that potential and existing attaching entities do still need pole attachment rate regulation because they are still not able to bargain from a level position with utility pole owners.[60] Cable operators

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[55] American Electric, et al., CS Docket No. 97-98 Comments at 8 (stating that since 1977, the cable industry has grown to a 67% coverage of homes in America, citing *Third Annual Report*, CS Docket No. 96-133 (In the Matter of Annual Assessment of Status of Competition in the Market for Delivery of Video Programming), 12 FCC Rcd 4358, 4368, para. 14 (1997)); *see also* American Electric, et al., Reply at 5.

[56] American Electric, et al., CS Docket No. 97-98 Comments at 23.

[57] *Id.*

[58] USTA CS Docket No. 97-98 Comments at 2 (quoting the *1977 Senate Report* at 3 ("The basic design of S. 1547, as reported, is to empower the [Commission] to exercise regulatory oversight over the arrangements between utilities and [cable television] systems in any case where the parties themselves are unable to reach a mutually satisfactory arrangement")).

[59] USTA CS Docket No. 97-98 Comments at 2.

[60] *See* Comcast, et al., Reply at 16; NCTA Reply at 3-6; New York Cable Television Assn. at 2-3; Teligent Reply at 5-6.

and telecommunications carriers urge the Commission to extend the existing negotiation and complaint resolution system to telecommunications carriers.[61]

15. Some attaching entities suggest that the Commission impose on itself a 90-day time frame in which to issue a decision on a pole attachment complaint.[62] Other cable and telecommunications carriers request that the Commission impose upon utility pole owners the requirement that pole attachment agreements between private parties be on public record so that an attaching entity will have notice of: (1) the expectations of the utility; and (2) the terms provided to other attaching entities.[63] The result would be that the most favored provisions from various agreements would then be available to all attaching entities.[64] Pole owners assert that attaching entities have no legitimate expectation that all provisions be available to all attaching entities.[65]

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[61] *See, e.g.*, AT&T Comments at 2, Reply at 4; Champlain Valley Telecom, et al., Reply at 6 (objecting to attitude of American Electric, et al., reminding the Commission that its authority is not plenary); Comcast, et al., Reply at 16; NCTA Reply at 3-6. *Cf.* New York Cable Television Assn. at 2-3 (current rule gives utility pole owner too much leverage); Teligent Reply at 5-6 (sole reliance on negotiations is not enough).

[62] *See* Ameritech Reply at 3-4 (complaint process should provide for expeditious resolution of disputes); KMC Telecom Comments at 5-6 (90 days for the Commission to resolve complaints as a means to workable solutions).

[63] *See* ICG Communications Comments at 16, Reply at 1-2; KMC Telecom Comments at 5-6.

[64] *See* ICG Communications Comments at 16.

[65] *See* American Electric, et al., Reply at 34; Duquesne Light Comments at 19; Edison Electric/UTC Comments at 6-7; Ohio Edison Comments at 18; Union Electric Comments at 17.

B. *Discussion*

16. Our rules for complaint resolution will only apply when the parties are unable to arrive at a negotiated agreement.[66] We affirm our belief that the existing methodology for determining a presumptive maximum pole attachment rate, as modified in this *Order*, facilitates negotiation because the parties can predict an anticipated range for the pole attachment rate.[67] We further conclude that the current complaint procedures are adequate to establish just and reasonable rates, terms, and conditions for pole attachments.[68] No party has demonstrated that the Commission's time for resolution has been a problem in the past. While we will not impose a deadline for Commission action, we will continue to endeavor to resolve complaints expeditiously. An uncomplicated complaint process and a clear formula for rate determination are essential to promote the use of negotiations for pole attachment rates, terms, and conditions.[69] We are committed to an environment where attaching entities have enforceable rights, where the interests of pole owners are recognized, and where both parties can negotiate for pole attachment rates, allowing the availability of telecommunications services to expand.

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[66] *See* American Electric, et al., Comments at 15; AT&T Comments at 2; Bell Atlantic Reply at 2; Carolina Power, et al., Reply at 11; GTE Reply at 5; MCI Comments at 2; NCTA Comments at 3-4; New York State Investor Owned Electric Utilities Comments at 6; USTA Reply at 2.

[67] *See, e.g.*, AT&T Reply at 4; ICG Communications Comments at 11; MCI Comments at 2; NCTA Comments at 3-4; *see also* Ameritech Reply at 3-5 (favors transparent maximum rate determinations); GTE Reply at 4-5 (uniform and transparent rate formula facilitates private negotiations); KMC Telecom Reply at 1-2 (clear formula and complaint process supports negotiation).

[68] *See* AT&T Comments at 2; MCI Comments at 2; NCTA Comments at 3-4.

[69] *See* GTE Reply at 4-5.

17. We agree with attaching entities that time is critical in establishing the rate, terms, and conditions for attaching.[70] Prolonged negotiations can deter competition because they can force a new entrant to choose between unfavorable and inefficient terms on the one hand or delayed entry and, thus, a weaker position in the market on the other.[71] For these reasons, we reject a proposal by utilities that we mandate a 180-day negotiation period prior to filing a complaint with the Commission. We agree with cable and telecommunications carriers that such a requirement would not be conducive to a pro-competitive, deregulatory environment.[72] Such an extended period of time could delay a telecommunications carrier's ability to provide service and unnecessary obstruct the process.[73]

18. We disagree with utilities suggesting that, in addition to the existing time frames, the pole owner should receive 30 days' notice by a cable operator or telecommunications carrier of any intention to file a complaint.[74] Such a notice requirement would be redundant under our rule and would unnecessarily prolong the resolution of disputes. The current rule provides for a 45-day period in which the utility pole

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[70] *See* AT&T Reply at 4; Ameritech Reply at 3; ICG Communications Comments at 11; MCI Reply at 3.

[71] *See* AT&T Reply at 4 (time is of the essence in negotiation); Ameritech Reply at 3-4 (the Commission should provide for expeditious resolution so that market entry is not delayed); ICG Communications Comments at 11 (timing is important); MCI Reply at 3 (time to market is critical).

[72] *See* ICG Communications Reply at 2-3; KMC Telecom Reply at 4; MCI Reply at 2-3.

[73] *But see* Duquesne Light Comments at 18; Edison Electric/UTC Comments at 7; Carolina Power, et al., Comments at 18-19.

[74] *See* American Electric, et al., Reply at 30; Edison Electric/UTC Reply at 6; GTE Comments at 4-5; USTA Comments at 2, Reply at 4.

owner must respond to the request for access filed by a cable operator or telecommunications carrier seeking to install an attachment.[75] A complaint to the Commission must be filed within 30 days of the denial of a request for access.[76] The utility then has an additional 30 days to respond to the complaint.[77] When a cable operator or a telecommunications carrier believes it has cause to complain that a pole attachment rate, term, or condition is not just or reasonable, [78] a detailed set of data and information is required under the current rule.[79] A utility has 30 days in which to respond to an attaching entity's request for the data and information regarding the rate, term, or condition required for the complaint.[80] Under the present rules, the utility has had communication with the attaching entity prior to the filing of the complaint, to such a degree as is necessary to understand the issues in conflict outlined in the complaint. The utility has sufficient notice of the issues involved, making additional notice requirements unnecessary.

19. GTE suggests that we impose a one year statute of limitations on the filing of a complaint and suggests an amount in controversy threshold of $5,000.[81] We view these proposals as unnecessarily restrictive as they could foreclose remedy of an unjust or unreasonable rate, term, or condition of pole attachments, especially for small enterprises.[82] There

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[75] 47 C.F.R. § 1.1403(b).

[76] 47 C.F.R. § 1.1404(k).

[77] 47 C.F.R. § 1.1407(a).

[78] 47 U.S.C. §§ 224(b)(1), (d)(1), (e)(1).

[79] 47 C.F.R. §§ 1.1404(g)(1-12), (h), (i).

[80] 47 C.F.R. § 1.1404(h).

[81] *See* GTE Comments at 4-5.

[82] *See generally*, SCBA Reply.

is no provision in the statute for such restrictions. Establishing a threshold of any dollar amount could preclude relief to small entities and would be inconsistent with Section 257 and the pro-competitive goals of the 1996 Act.[83]

20. Utility pole owners must provide access to attaching entities on a non- discriminatory basis.[84] While we do not agree that all pole attachment agreements have to be identical, differing provisions must not violate the statutory requirement that terms be just, reasonable, and nondiscriminatory. We believe that these statutory standards are enforceable under the current rule.

21. We believe it is implicit in our current rule [85] that all parties must negotiate in good faith for non-discriminatory access at just and reasonable pole attachment rates.[86] In the *Local Competition Order*, the Commission addressed the requirement of Section 251 that requires an ILEC to provide interconnection and other rights to new entrants, and observed that new entrants have little to offer the

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[83] 47 U.S.C. § 257. This section requires the Commission to eliminate market entry barriers for entrepreneurs and other small businesses in the provision or ownership of telecommunication services or in the provision of parts or services to telecommunications providers.

[84] 47 U.S.C. § 224(f)(1).

[85] 47 C.F.R. § 1.1404.

[86] In furtherance of our original mandate to institute an expeditious procedure for determining pole attachment rates with a minimum of administrative costs and consistent with fair and efficient regulation, we adopted a program for non-discriminatory access to poles, ducts, conduits and rights-of-way in the *Local Competition Order*. 11 FCC Rcd at 16059, para. 1122 (citing the *1977 Senate Report* at 19). In the *Notice*, the Commission affirmed its interpretation of Congressional intent that negotiations between a utility and an attacher should continue to be the primary means by which pole attachment issues are resolved. *See Notice*, 12 FCC Rcd at 11731, para. 12; *see also* 47 U.S.C. § 224(f)(1).

incumbent.[87] Rather, these new competitors seek to reduce the incumbent's subscribership and weaken the incumbent's dominant position in the market. An ILEC is likely to have scant, if any, economic incentive to reach agreement.[88] In the *Local Competition Order*, the Commission determined that a utility stood in a position vis-a-vis the competitive telecommunications provider seeking pole attachment agreements that was virtually indistinguishable from that of the ILEC with respect to a new entrant seeking interconnection agreements under Sections 251 and 252 of the 1996 Act.[89] We find that a utility's demand for a clause waiving the licensee's right to federal, state, or local regulatory relief would be per se unreasonable and an act of bad faith in negotiation. In particular, a request that a pole attachment agreement include a clause waiving statutory rights to file a complaint with the Commission is per se unreasonable.[90]

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[87] 11 FCC Rcd at 15570, para. 141.

[88] *Id.* The Commission continued, determining that a request by an incumbent that a new entrant contractually waive its legal rights or remedies could constitute a violation of the duty to negotiate in good faith imposed by Sections 251(c)(1) and 252, stating: "We reject the general contention that a request by a party that another party limit its legal remedies as part of a negotiated agreement will in all cases constitute a violation of the duty to negotiate in good faith. A party may voluntarily agree to limit its legal rights or remedies in order to obtain a valuable concession from another party. . . . [W]e find that it is a per se failure to negotiate in good faith for a party to refuse to include in an agreement a provision that permits the agreement to be amended in the future to take into account changes in Commission or state rules. Refusing to permit a party to include such a provision would be tantamount to forcing a party to waive its legal rights in the future." *Id.* at 15576, para. 152.

[89] *See id.* at 15570, para. 141.

[90] *See* Letter from Meredith J. Jones, Chief, Cable Services Bureau to Danny E. Adams, Esq., Kelley Drye & Warren LLP, DA No. 97-131 (January 17, 1997).

IV. CHARGES FOR ATTACHING

A. *Poles*

1. Formula Presumptions

22. In determining a just and reasonable rate, two elements of the pole are examined: usable space and other than usable space. The costs relating to these elements are allocated to those using the pole. In the *Second Report and Order*, consistent with Section 224(d)(2), the Commission defined total usable space as the space on the utility pole above the minimum grade level[91] that is usable for the attachment of wires, cables, and related equipment.[92] This determination was based upon survey results, consideration of the National Electric Safety Code ("NESC"), and practical engineering standards used in constructing utility poles. The Commission found that "the most commonly used poles are 35 and 40 feet high, with usable spaces of 11 to 16 feet, respectively."[93] The Commission recognized the NESC guideline that 18 feet of the pole space must be reserved for ground clearance[94] and that six feet of pole space is for setting the depth of the pole.[95] To avoid a pole by pole rate calculation, the Commission adopted rebuttable presumptions of an average pole height of 37.5 feet, an average amount of usable space of 13.5 feet, and an average amount of 24 feet of unusable space on a pole. The Commission established a rebuttable presumption of one foot as the amount of space a cable television attachment

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[91] In this context, minimum grade level generally refers to the ground level or elevation above which distances are measured for determining required clearances.

[92] *See* 72 FCC 2d at 69; 47 C.F.R. § 1.1402(c).

[93] 72 FCC 2d at 69.

[94] *Id.* at 68, n.21.

[95] *Id.*

occupies.[96] These presumptions serve as the premise for calculating pole attachment rates under the current formula.

23. A group of electric utilities filed a white paper ("*White Paper*") in anticipation of the *Notice* and the *Pole Attachment Fee Notice*[97] in which they suggest that an increase in the current presumptive pole height is appropriate. The *White Paper* asserts that over time, and with increased demand, the average pole height has increased to 40 feet. At the same time, the *White Paper* contends that the usable space presumption should be reduced from 13.5 feet to 11 feet.[98] The Commission sought comment on these presumptions in the *Pole Attachment Fee Notice* and sought further comment in the *Notice* to establish a full record for attachments made by telecommunications carriers under the 1996 Act.[99]

24. We will address changing the existing presumptions in the *Pole Attachment Fee Notice* rulemaking.[100] Until resolution of that proceeding, we will apply our presumptions as they presently exist and proceed with the implementation under the 1996 Act of a methodology used in the provision of

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[96] *Id.* at 69-70.

[97] *See White Paper* filed by the law firm of McDermott, Will and Emery on August 28, 1996, on behalf of the American Electric Power Service Corporation, Commonwealth Edison Company, Duke Power Company, Entergy Services, Inc., Florida Power and Light Company, Northern States Power Company, The Southern Company and Washington Water Power Company.

[98] *Id.* at 11.

[99] *Notice*, 12 FCC Rcd at 11733, para. 17.

[100] *See Pole Attachment Fee Notice*, 12 FCC Rcd at 7458-59, paras. 18-20. We reserve decision on issues regarding the 37.5 ft. presumptive pole height, the 13.5 ft. presumptive amount of usable space, the minimum ground clearance amount, the allocation of the 40-inch safety space, and the exclusion of 30 ft. poles from the calculation of costs of a bare pole and the determination as to whether such poles lack a sufficient amount of usable space to accommodate multiple attachments.

telecommunications services by telecommunications carriers and cable operators.

25. The *Notice* also sought comment on an issue raised by Duquesne Light in its reconsideration petition of the Commission's decision in the *Local Competition Order* proceeding.[101] Duquesne Light advocates that the number of physical attachments of an attaching entity is not necessarily reflective of the burden on the pole, and therefore of the costs relating to the attachment. Duquesne Light states that varying attachments place different burdens on the pole and proposes that any presumption include factors addressing weight and wind loads.[102] We will address whether any presumptions should reflect these factors in the *Pole Attachment Fee Notice* rulemaking.

2. Restrictions on Services Provided over Pole Attachments

26. In the *Notice*, we sought comment on whether the Commission's decision in *Heritage Cablevision Associates of Dallas, L.P. v. Texas Utilities Electric Company* ("*Heritage*")[103] should be extended.[104] In *Heritage*, a cable operator provided traditional cable services as well as nontraditional services through its facilities. Those facilities consisted of coaxial cable lashed to aerial support strands and fiber optic cable overlashed to the aerial support strands.[105]

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[101] *Notice*, 12 FCC Rcd at 11733, para. 18 (citing *Local Competition Order*, 11 FCC Rcd at 16058-107, paras. 1119-1240); *see also* Duquesne Light CC Docket No. 96-98 Comments at 17-18.

[102] Duquesne Light CC Docket No. 96-98 Comments at 17-18.

[103] 6 FCC Rcd 7099 (1991), *recon. dismissed*, 7 FCC Rcd 4192 (1992), *aff'd sub nom. Texas Utilities Electric Co. v. FCC*, 977 F.2d 925 (D.C. Cir. 1993).

[104] *Notice*, 12 FCC Rcd at 11731, para. 13.

[105] *Heritage*, 6 FCC Rcd at 7100.

The nontraditional services provided by the cable operator consisted of non-video broadband communications services, including data transmission services.[106] The pole owner attempted to charge the cable operator an additional, unregulated rate for those poles with pole attachments supporting the facilities transmitting both video signals and data.[107]

27. In *Heritage*, which was decided prior to the 1996 Act, the Commission determined that the provision by a cable operator of both traditional cable services and nontraditional services on a commingled basis over a single network within the cable operator's franchise area justified only a single, regulated pole attachment charge by the utility pole owner.[108] The Commission affirmed its longstanding view of cable as a provider of video and nonvideo broadband services and determined that its pole attachment authority includes nonvideo broadband services under Section 224. The Commission stated that its jurisdiction under Section 224 was not limited by definitions emanating from the Cable Communications Policy Act of 1984 ("Cable Act of 1984") [109] because such definitions apply only for purposes of Title VI.[110] Further, it stated that, even when Section 224 is read in conjunction with the Cable Act of 1984, the Cable Act of 1984 and its legislative history indicate that a cable system providing both video and nonvideo broadband services is not excluded from the benefits of Section 224.[111]

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[106] *Id.*

[107] *Id.*

[108] *Id.* at 7107.

[109] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (Oct. 30, 1984).

[110] *Heritage*, 6 FCC Rcd at 7103-04.

[111] *Id.* at 7104. The U.S. Court of Appeals for the District of Columbia Circuit upheld the Commission's decision on appeal because it was

28. Whether *Heritage* continues to apply raises significant issues as cable operators expand into new service areas, such as Internet services. Generally, commenters disagree as to the applicability of *Heritage* since the passage of the 1996 Act amendments to Section 224. Some utility pole owners contend that *Heritage* has been overruled by the 1996 Act, but they do not agree as to the effect of the overruling. Some of the utility pole owners argue that the new Sections 224(d)(3) and 224(e) create a new regime requiring new rules,[112] and therefore *Heritage* is no longer applicable. Some of these commenters also argue that, after the year 2001, a cable company is entitled to the old incremental rate under Section 224(d)(3) if the pole attachment is used solely to provide cable services. They contend that the use of a cable attachment to provide nonvideo services in addition to video would not be an attachment used solely for cable service and such attachment would be subject to the Section 224(e) telecommunications services rate.[113] Other utility pole owners argue that the provision of services other than cable and telecommunications services are outside the scope of Section 224 and are therefore not subject to the Commission's jurisdiction.[114] They contend

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"consistent with the congressional purpose to avoid abusive pole attachment practices by utilities for the FCC to regulate any attachment by a cable operator within its franchise area and within its cable television system." *Texas Utilities v. FCC*, 977 F.2d at 936.

[112] Texas Utilities Reply at 2; GTE Comments at 8; USTA Comments at 4.

[113] Edison Electric/UTC Comments at 9.

[114] American Electric, et al., Comments at 11 (citing *Report and Order*, CC Docket No. 96-45 (In the Matter of Federal-State Joint Board on Universal Service), 12 FCC Rcd 8776 ("*Universal Service Order*"), 9176, para. 781); Duquesne Light Comments at 21; Ohio Edison Comments at 20; Union Electric Comments at 19.

that such services will be subject to market place negotiations.[115]

29. Cable operators generally contend that *Heritage* has not been overruled by the 1996 Act. They also contend that high speed Internet access is a cable service and an operator offering such service should not be assessed the Section 224(e) telecommunications services rate.[116] Telecommunications carriers generally agree that *Heritage* has not been overruled, and therefore the pre-1996 Act rules continue to provide that a utility should not charge different pole attachment rates based on the type of service provided by the cable operator, and further that a utility should be prohibited from placing unreasonable restrictions on the use of pole attachments by permitted attachers.[117] Some of the telecommunications carriers, however, oppose any extension of *Heritage*, arguing that such extension would provide preferential treatment for cable operators.[118] At least one telecommunications carrier argues that the distinctions established by Congress effectively overrule *Heritage* and that cable operators providing additional services besides video service are to be treated as telecommunications carriers under Section 224.[119]

30. We disagree with the utility pole owners who assert that the *Heritage* decision has been "overruled" by the passage of the 1996 Act insofar as it held that a cable system

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[115] Duquesne Light Comments at 21; Ohio Edison Comments at 20; Union Electric Comments at 19.

[116] Comcast, et al., Comments at 18; NCTA Comments at 6-7, n.9; New York Cable Television Assn. Comments at 8.

[117] RCN Comments at 5-6; Sprint Comments at 2, Reply at 1-2 (citing MCI Comments at 4-5); U S West Comments at 4-5.

[118] MCI Comments at 6.

[119] *See* Ameritech Comments at 4.

is entitled to a Commission-regulated rate for pole attachments that the cable system uses to provide commingled data and video. The definition of "pole attachment" does not turn on what type of service the attachment is used to provide. Rather, a "pole attachment" is defined to include any attachment by a "cable television system."[120] Thus, the rates, terms and conditions for all pole attachments by a cable television system are subject to the Pole Attachment Act.[121] Under Section 224(b)(1), the Commission has a duty to ensure that such rates, terms, and conditions are just and reasonable.[122] We see nothing on the face of Section 224 to support the contention that pole owners may charge any fee they wish for Internet and traditional cable services commingled on one transmission facility.

31. The history of Section 224 further supports our conclusion. The purpose of the amendments to Section 224 made by the 1996 Act was similar to the purpose behind Section 224 when it was first enacted in 1978, *i.e.*, to remedy the inequitable position between pole owners and those seeking pole attachments.[123] The nature of this relationship is not altered when the cable operator seeks to provide additional service. Thus, it would make little sense to conclude that a cable operator should lose its rights under Section 224 by commingling Internet and traditional cable services. Indeed, to accept contentions that cable operators expanding their services to include Internet access no longer are entitled to the benefits of Section 224 would penalize cable entities that choose to expand their services in a way that will contribute "to promot[ing] competition in every

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[120] 47 U.S.C. § 224(a)(4).

[121] 47 U.S.C. § 224(b)(1).

[122] *Texas Utilities v. FCC*, 977 F.2d at 934-35.

[123] *1997 Senate Report* at 19, 20.

sector of the communications industry," as Congress intended in the 1996 Act.[124]

32. Having decided that cable operators are entitled to the benefits of Section 224 when providing commingled Internet and traditional cable services, we next turn to the appropriate rate to be applied. We conclude, pursuant to Section 224 (b)(1), that the just and reasonable rate for commingled cable and Internet service is the Section 224(d)(3) rate. In specifying this rate, we intend to encourage cable operators to make Internet services available to their customers.[125] We believe that specifying a higher rate might deter an operator from providing non-traditional services. Such a result would not serve the public interest. Rather, we believe that specifying the Section 224(d)(3) rate will encourage greater competition in the provision of Internet service and greater benefits to consumers.

33. We emphasize that our decision to apply the Section 224(d)(3) rate is based on our regulatory authority under Section 224(b)(1). Several commenters suggested that cable operators providing Internet service should be required to pay the Section 224(e) telecommunications rate.[126] We disagree. The *Universal Service Order* concluded that Internet service is not the provision of a telecommunications service under the

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[124] Preamble to the 1996 Act; *see also* 142 Cong. Rec. S687-01, S687 (daily ed. February 1, 1996) (Statement of Sen. Hollings).

[125] We have, through social contracts, encouraged cable operators to provide Internet services to their customers. *See Social Contract for Continental Cablevision*, 10 FCC Rcd 299 (1995), *amended by* 11 FCC Rcd 11118 (1996); *Social Contract for Time Warner*, 11 FCC Rcd 2788 (1995), *amended by* FCC Rcd 3099 (1995), *further amended by* 12 FCC Rcd 14881(1996).

[126] *See, e.g.*, Ameritech Comments at 4; Edison Electric/UTC Comments at 9-10; GTE Comments at 6; MCI Comments at 6.

1996 Act.[127] Under this precedent, a cable television system providing Internet service over a commingled facility is not a telecommunications carrier subject to the revised rate mandated by Section 224(e) by virtue of providing Internet

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[127] *See* Federal-State Joint Board on Universal Service, *Report and Order*, CC Docket No. 96-45, 12 FCC Rcd 8776, at 9180-81, para.789 (rel. May 8, 1997), as corrected by Federal-State Joint Board on Universal Service, *Errata*, CC Docket No. 96-45, FCC 97-157 (rel. June 4, 1997), *appeal pending in Texas Office of Public Utility Counsel v. FCC and USA*, No. 97-60421 (5th Cir. 1997); Federal-State Joint Board on Universal Service, *Order on Reconsideration*, CC Docket No. 96-45, 12 FCC Rcd 10095 (rel. July 10, 1997); Changes to the Board of Directors of the National Exchange Carrier Association Inc., Federal-State Joint Board on Universal Service, *Report and Order and Second Order on Reconsideration*, CC Docket Nos. 97-21, 96-45, FCC 97-253 (rel. July 18, 1997), as corrected by Federal-State Joint Board on Universal Service, *Errata*, CC Docket No. 96-45, DA 97-2477 (rel. Dec. 3, 1997); Changes to the Board of Directors of the National Exchange Carrier Association Inc., Federal-State Joint Board on Universal Service, *Order on Reconsideration, Second Report and Order and Further Notice of Proposed Rulemaking*, CC Docket Nos. 97-21, 96-45, FCC 97-292, 12 FCC Rcd 12437 (rel. Aug. 15, 1997); Federal-State Joint Board on Universal Service, *Third Report and Order*, CC Docket No. 96-45, (rel. Oct. 14, 1997), as corrected by Federal-State Joint Board on Universal Service, *Erratum*, CC Docket Nos. 96-45 and 97-160 (rel. Oct. 15, 1997); Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal- State Joint Board on Universal Service, *Second Order on Reconsideration in CC Docket 97-21*, CC Docket Nos. 97-21, 96-45, FCC 97-400 (rel. Nov. 26, 1997); Federal-State Joint Board on Universal Service, *Third Order on Reconsideration*, CC Docket No. 96-45, FCC 97-411 (rel. Dec. 16, 1997); Federal-State Joint Board on Universal Service, Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charge, *Fourth Order on Reconsideration*, CC Docket Nos. 96-45, 96-262, 94- 1, 91-213, 95-72, FCC 97-420 (rel. Dec. 30, 1997), as corrected by Federal-State Joint Board on Universal Service, *Errata*, CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, DA 98-158 (rel. Jan 29, 1998).

service. We note, however, that Congress has directed the Commission to undertake a review of the implementation of the provisions of the 1996 Act relating to universal service, and to submit a report to Congress no later than April 10, 1998.[128] That report is to provide a detailed description of, among other things, the extent that the Commission's definition of "telecommunications" and "telecommunications service," and its application of those definitions to mixed or hybrid services," are consistent with the language of the 1996 Act.[129] We do not intend, in this proceeding, to foreclose any aspect of the Commission's ongoing examination of those issues.

34. We need not decide at this time, however, the precise category into which Internet services fit. Such a decision is not necessary in order to determine the pole attachment rate applicable to cable television systems using pole attachments to provide traditional cable services and Internet services. Regardless of whether such commingled services constitute "solely cable services" under Section 224(d)(3), we believe that the subsection (d) rate should apply. If the provision of such services over a cable television system is a "cable service" under Section 224(d)(3), then the rate encompassed by that section would clearly apply.[130] Even if the provision

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[128] Pub. L. 105-119, 111 Stat. 2440 (1997), sec. 623.

[129] *Id.*

[130] The legislative history of the 1996 Act may be read to support such a conclusion. See Conf. Rpt. at 206 which indicates that, "to the extent that a company seeks pole attachment for a wire used solely to provide cable television services (as defined by Section 602(6) of the Communications Act), that cable company will continue to pay the rate authorized under current law (as set forth in subparagraph (d)(1) of the 1978 Act)." Further, the Conference Report states that "[t]he conferees intend the amendment to reflect the evolution of cable to interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services," but

of Internet service over a cable television system is deemed to be neither "cable service" nor "telecommunications service" under the existing definitions, the Commission is still obligated under Section 224(b)(1) to ensure that the "rates, terms and conditions [for pole attachments] are just and reasonable," and, as Section 224(a)(4) states, a pole attachment includes "any attachments by a cable television system." And we would, in our discretion, apply the subsection (d) rate as a "just and reasonable rate" for the pro-competitive reasons discussed above. We again emphasize the pervasive purpose of the 1996 Act and the premise of the Commission's *Heritage* decision, to encourage expanded services, and that a higher or unregulated rate deters this purpose.[131] We note that in the one case where Congress affirmatively wanted a higher rate for a particular service offered by a cable system, it provided for one in section 224(e). In requiring that the Section 224(d) rate apply to any pole attachment used 'solely to provide cable service,' we do not believe Congress intended to bar the Commission from determining that the Section 224(d) rate methodology also would be just and reasonable in situations where the Commission is not statutorily required to apply the higher Section 224(e) rate.

35. We also disagree with utility pole owners that submit that all cable operators should be "presumed to be telecommunications carriers" and therefore charged at the higher rate unless the cable operator certifies to the Commission that it is not "offering"[132] telecommunications

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was not intended to "cause dial-up access to information services over telephone lines to be classified as a cable service." *Conf. Rpt.* at 169.

[131] *See also Texas Utilities v. FCC*, 977 F.2d at 931-933.

[132] Telecommunications services means the offering of telecommunications for a fee directly to the public, or to such classes of users as

services.[133] We think that a certification process would add a burden that manifests no benefit. We believe the need for the pole owner to be notified is met by requiring the cable operator to provide notice to the pole owner when it begins providing telecommunication services. The rule we adopt in this *Order* will reflect this required notification. We also reject the suggestions of utility pole owners that the Commission should be responsible for monitoring and enforcing a certification of cable operators regarding their status.[134] The record does not demonstrate that cable operators will not meet their responsibilities. If a dispute arises, the Commission's complaint processes can be invoked.

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to be effectively available directly to the public, regardless of the facilities used. 47 U.S.C. § 153(43).

[133] *See* American Electric, et al., Comments at 46-47; Bell Atlantic Comments at 3; Colorado Springs Utilities Comments at 3; ICG Communications Comments at 27; MCI Comments at 6-9.

[134] *See* American Electric, et al., Comments at 46-47; Bell Atlantic Comments at 3; Colorado Springs Utilities Comments at 3; ICG Communications Comments at 27; MCI Comments at 6-9.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Oct. 12, 2000]

No. 98-6222

FCC Agency No. 97-151

GULF POWER COMPANY, ALABAMA POWER COMPANY, *et al.*,
Petitioners,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-2589

FCC Agency No. 97-151

TAMPA ELECTRIC COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-4675

FCC Agency No. 98-20-FCC

FLORIDA POWER & LIGHT COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6414

FCC Agency No. 98-20

COMMONWEALTH EDISON COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6430

FCC Agency No. 97-151-CS

POTOMAC ELECTRIC POWER COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6431

FCC Agency No. 97-151-CS

TEXAS UTILITIES ELECTRIC COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6442

FCC Agency No. 97-151-CS

UNION ELECTRIC COMPANY, d.b.a. AMERENUE,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6458

FCC Agency No. 97-151-CS

AMERICAN ELECTRIC POWER SERVICES CORPORATION,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6476

FCC Agency No. 97-151

DUKE ENERGY CORPORATION,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6477

FCC Agency 97-151

VIRGINIA ELECTRIC AND POWER COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6478

FCC Agency No. 97-151

CAROLINA POWER & LIGHT COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6485

FCC Agency No. 97-151

DUQUESNE LIGHT COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6486-CC

FCC Agency No. 97-151

DUQUESNE LIGHT COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

Petitions for Review of an Order
of the Federal Communications Commission

ORDER:

( ) The motion of Respondents, Federal Communications Commission and United States (FCC) for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is granted.

( ) The motion of Respondents, FCC for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of Respondents, FCC, for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of Respondents, FCC, for a further stay of the issuance of the mandate is DENIED.

/s/ [illegible]
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6486-CC

FCC Agency No. 97-151

DUQUESNE LIGHT COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

Petitions for Review of an Order
of the Federal Communications Commission

ORDER:

( ) The motion of Intervenor, National Cable Television Association, Inc. (NCTA) for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is granted.

( ) The motion of Intervenor, NCTA, for (X) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of Intervenor, NCTA, for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of Intervenor, NCTA, for a further stay of the issuance of the mandate is DENIED.

/s/ [illegible]
UNITED STATES CIRCUIT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed Sep. 12, 2000]

No. 98-6222

FCC Agency No. 97-151

GULF POWER COMPANY;
ALABAMA POWER COMPANY, *et al.*,
Petitioners,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-2589

FCC Agency No. 97-151

TAMPA ELECTRIC COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-4675

FCC Agency No. 98-20-FCC

FLORIDA POWER & LIGHT COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6414

FCC Agency No. 98-20

COMMONWEALTH EDISON COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6430

FCC Agency No. 97-151-CS

POTOMAC ELECTRIC POWER COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6431

FCC Agency No. 97-151-CS

TEXAS UTILITIES ELECTRIC COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6442

FCC Agency No. 97-151-CS

UNION ELECTRIC COMPANY, d.b.a. AMERENUE,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6458

FCC Agency No. 97-151-CS

AMERICAN ELECTRIC POWER SERVICES CORPORATION,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6476

FCC Agency No. 97-151

DUKE ENERGY CORPORATION,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6477

FCC Agency 97-151

VIRGINIA ELECTRIC AND POWER COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6478

FCC Agency No. 97-151

CAROLINA POWER & LIGHT COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

No. 98-6485

FCC Agency No. 97-151

DUQUESNE LIGHT COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6486

FCC Agency No. 97-151

DUQUESNE LIGHT COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

Petitions for Review of an Order
of the Federal Communications Commission

BEFORE: TJOFLAT and CARNES, Circuit Judges, and GARWOOD,* Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by Intervenor WORLDCOM, INC. is DENIED.

ENTERED FOR THE COURT:

/s/ [illegible]
UNITED STATES CIRCUIT JUDGE

* Honorable Will L. Garwood, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6486

FCC Agency No. 97-151

DUQUESNE LIGHT COMPANY,
Petitioner,

versus

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

Petitions for Review of an Order
of the Federal Communication Commission

BEFORE: TJOFLAT and CARNES, Circuit Judges, and GARWOOD*, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by Intervenor National Cable Television Association is DENIED.

ENTERED FOR THE COURT:

/s/ [illegible]
UNITED STATES CIRCUIT JUDGE

* Honorable Will L. Garwood, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

APPENDIX E

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

GULF POWER COMPANY,
ALABAMA POWER COMPANY, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

TAMPA ELECTRIC COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

FLORIDA POWER & LIGHT COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

COMMONWEALTH EDISON COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

POTOMAC ELECTRIC POWER COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

TEXAS UTILITIES ELECTRIC COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

UNION ELECTRIC COMPANY, d.b.a. AMERENUE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

AMERICAN ELECTRIC POWER SERVICES CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

DUKE ENERGY CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

VIRGINIA ELECTRIC AND POWER COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

CAROLINA POWER & LIGHT COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

DUQUESNE LIGHT COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

DUQUESNE LIGHT COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Respondents.

Nos. 98-6222, 98-2589, 98-4675, 98-6414, 98-6430, 98-6431, 98-6442, 98-6458, 98-6476 to 98-6478, 98-6485 and 98-6486.

Sept. 12, 2000

Petitions for Review of an Order of the Federal Communications Commission (Nos. 97-151-CS, 98-20-FCC).

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion April 11, 2000, 11th Cir., 2000, 208 F.3d 1263)

Before TJOFLAT, EDMONDSON, BLACK, CARNES, BARKETT, MARCUS and WILSON, Circuit Judges.

PER CURIAM:

The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing En Banc is DENIED.

- All other active judges of the Court were recused.

CARNES, Circuit Judge, concerning the denial of rehearing en banc:

My opinion concurring in part and dissenting in part from the panel decision, *see Gulf Power Co. v. FCC*, 208 F.3d 1263, 1279 (11th Cir.2000), explains why I think the panel majority erred in holding the Pole Attachment Act's regulated rate provisions do not extend to attachments used for wireless communications and Internet services. There is no point in reiterating here what I said there. Instead, I write separately upon the denial of rehearing en banc, because this case is a good example of why the absolute majority provision of Federal Rule of Appellate Procedure 35(a) needs to be changed by Congress or by the Supreme Court through the Rules Enabling Act, *see* 28 U.S.C. § 2072.[1]

Rule 35(a) provides that: "A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc." This Court, along with some of the other federal courts of appeals, has interpreted "circuit judges who are in regular active service" to include all active circuit judges serving on the court at the time of the poll including those judges who are disqualified from participating. In other words, we interpret the rule to mean that the votes of absolute majority, or seven of the twelve judges in active service on our court now, are necessary to take a case en banc. I do not quarrel with our interpretation of the rule, although we are on the short side of a circuit split regarding it, *see* Judith A. McKenna et al., Federal Judicial Center, *Case Management Procedure in the Federal Courts of Appeals* 23 (2000) (table

[1] The operative language in Rule 35(a) is drawn from 28 U.S.C. § 46(c), which would need to be amended by Congress or superceded by an amendment to the rule, *see* 28 U.S.C. § 2072(b).

indicating that eight circuits do not count disqualified judges when calculating a majority for en banc rehearing purposes, while five circuits do).[2] But I do think that Rule 35(a) should be amended so that it is clear that disqualified judges are not counted, in effect, as a vote against rehearing en banc.

As the order denying rehearing en banc in this case indicates, five of the twelve judges in active service on this Court are disqualified from participating in this important case.[3] That leaves only seven judges. Two of those seven judges split on the legal issue in question—one of them authored the panel majority opinion and the other one dissented from an important holding in it. Yet the dissenting judge and the five remaining, non-disqualified judges in active service are unable to vote the case en banc under Rule 35(a), no matter how wrong they may think the panel majority's holding is, unless the judge who authored the panel majority opinion votes with them to do it. It sometimes happens that a judge who authors a panel opinion votes to

[2] A good recounting of the history of the interpretative issue and a summary of the arguments on both sides of it are contained in James J. Wheaton, Note, *Playing with Numbers: Determining the Majority of Judges Required to Grant En Banc Sittings in the United States Courts of Appeals*, 70 Va. L.Rev. 1505 (1984). *See also* Michael Ashley Stein, *Uniformity in the Federal Courts: A Proposal for Increasing the Use of En Banc Appellate Review*, 54 U. Pitt. L.Rev. 805, 807-17, 825-27, 851-54 (1993).

[3] Some may say that all the order indicates is that five judges did not participate and that they obviously recused themselves, but not necessarily that they were disqualified from participating. *See generally* 28 U.S.C. § 46(b)("unless such judges cannot sit because recused or disqualified"). Whether there is any real distinction between recusal and disqualification is a collateral issue not material to the present discussion. What is material is that five judges of this Court in active service felt compelled not to participate in the en banc poll. I will follow what appears to be the practice of most commentators and decisions by using disqualification as a synonym for recusal.

take the case en banc, *see Songer v. Wainwright*, 756 F.2d 799 (11th Cir.1985)(Roney, J., specially concurring in the order granting rehearing en banc), but not very often.[4]

Assume with me, for present purposes, that this is not one of those rare cases in which the judge who authored the majority opinion for the panel wants to have it reviewed by the court sitting en banc—assume that judge has voted against en banc rehearing. If this is one of the usual cases where the author of the panel opinion votes against rehearing en banc, then this case could not be taken en banc no matter how strongly the remaining six non-disqualified judges thought it should be. En banc rehearing is not possible in such a situation because six is not seven, and Rule 35(a) insists on seven votes, and it is not satisfied by any fewer number, not even by six out of seven. The result is that the law of this circuit is decided not on the basis of the votes of a majority of the seven non-disqualified judges of this Court in active service, but instead by the vote of the senior judge from another circuit who was on the panel and broke the tie created by the conflicting votes of the two judges of this court in active service who were on the panel.[5] That is how Rule 35(a)'s absolute majority requirement operates.

As bad as the operation of Rule 35(a) is in this case, it can be worse. If one more judge in active service on this Court had been disqualified, it would have been impossible for the

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[4] Sometimes a judge will author or join a panel decision dictated by a prior panel precedent that the judge feels should be changed by the en banc court. In that circumstance, which does not occur with much frequency, it is not unusual for a judge who wrote or joined the panel decision to vote to take the case en banc, in effect using it as a vehicle for overruling the prior panel precedent.

[5] In the usual case there will be a visiting judge or a senior judge of this Court sitting on a panel with two active judges. That was the way more than 70 percent of our panels were composed this court year.

remaining six non-disqualified judges to vote the case en banc, even if the judge who authored the majority opinion was willing to take the extraordinary step of voting for en banc rehearing.

The rule as written can even operate to impose on the circuit and its judges law with which every non-disqualified judge in active service disagrees. It is not unusual for our court to sit in panels consisting of one active judge plus two senior judges, or an active judge plus one senior judge and one visiting judge.[6] With such panels, if six or more judges in active service are disqualified from participating in a case, Rule 35(a) makes it possible for the law of the circuit to be set by one senior judge and one visiting judge, even though every one of the non-disqualified judges in active service (up to six in number) adamantly disagree with them about what that law should be.

It can be worse still. If the chief judge of the circuit declares an emergency, which is defined to include the illness of a judge, the requirement that a majority of each panel of a court of appeals be members (active or senior) of that court of appeals is lifted. *See* 28 U.S.C. § 46(b).[7] Although not frequently invoked, this emergency provision has recently resulted in a panel of our Court being composed of one judge in active service and two visiting judges. *See Parris v. The*

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[6] By "visiting judge" I mean one who was not appointed to sit on this Court. A visiting judge can be a district judge from this or another circuit, or a senior circuit judge from another circuit.

[7] "In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness." 28 U.S.C. § 46(b).

Miami Herald Publ'g Co., 216 F.3d 1298, 1299 (11th Cir.2000) (panel consisting of one judge of this Court, a senior judge of another circuit, and a senior district court judge). In that circumstance, if six or more judges in active service on this Court were disqualified, Rule 35(a) could operate to have the law of the circuit made by two visiting judges, and there would be nothing that the six active judges of this Court who were not disqualified could do about it.

What possible justification can there be for the absolute majority rule—why make it possible to have the law of the circuit determined by one active judge against the views of six others, or by a senior and a visiting judge or two visiting judges against the views of six judges in active service? Why not let the decision whether to rehear a case en banc be made by a majority of the judges in active service who are not disqualified? More than a quarter of a century ago, Judge Mansfield, joined by two other Second Circuit judges, put forward two justifications for the absolute majority requirement of Rule 35(a), and 28 U.S.C. § 46(a) from which Rule 35(a) is drawn. *See Zahn v. Int'l Paper Co.*, 469 F.2d 1033, 1041 (2d Cir.1972)(Mansfield, J., concurring in the denial of rehearing en banc).

First, Judge Mansfield suggested, the absolute majority rule seeks "to achieve intracircuit uniformity by assuring that where questions of exceptional importance are presented the law of the circuit will be established by the vote of a majority of the full court rather than by a three-judge panel." *Id.* If protecting majority rule is the goal of Rule 35(a), then it is counterproductive. Under our prior panel precedent rule, a panel decision is the law of the circuit unless and until it is overruled by the Supreme Court or the en banc court. *See United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir.1998) ("The law of this circuit is emphatic that only the Supreme Court or this court sitting en banc can judicially overrule a prior panel decision.")(internal marks and citation omitted).

Every other circuit, or virtually every one, follows the same principle: The law of the circuit is established not just by en banc decisions, but by panel decisions as well. *See United States v. Washington*, 127 F.3d 510, 517 (6th Cir.1997)("In the Sixth Circuit, as well as all other federal circuits, one panel cannot overrule a prior panel's published decision."); Phillip M. Kannan, *The Precedential Force of Panel Law*, 76 Marq. L.Rev. 755, 755-56 (1993) ("[A]ll thirteen circuits, with the possible exception of the Seventh Circuit, have developed the interpanel doctrine: No panel can overrule the precedent established by any panel in the same circuit; all panels are bound by prior panel decisions in the same circuit."). The absolute majority requirement does nothing to prevent panel decisions from establishing the law of the circuit; instead, the requirement makes it more difficult, or impossible, to have the law made in some panel decisions reviewed en banc.

By insulating panel decisions from en banc review, the absolute majority rule makes it less likely that the law of the circuit will represent the views of a majority of the judges in active service. After all, which is a better bet to reflect the views of seven of twelve active judges—the views of six of those judges, or the views of one? And where a question of exceptional importance is involved, shouldn't the law of the circuit be decided by six out of twelve active judges instead of by one active judge coupled with a visiting judge? With en banc worthy issues is it not better to have the law of the circuit decided by six of twelve judges in active service than by one of them, or by none of them—which is what can happen under Rule 35(a) when a panel includes two senior judges or a senior and a visiting judge.

Judge Mansfield also suggested that the absolute majority requirement "serves the further salutary purpose of limiting en banc hearings to questions of exceptional importance rather than allow the court to drift into the unfortunate habit

of requiring such hearings in every case where a minority of the court may desire a decision by the full court." *Zahn*, 469 F.2d at 1041. Two things about that. First, the question is not whether to limit en banc review to questions of exceptional importance, but who is better to decide whether a case meets that standard and warrants en banc review—a majority of the judges in active service who are not disqualified, or a minority of those non-disqualified judges, perhaps only one of them? Second, whatever may have been the case a quarter of a century ago, viewed from the perspective of federal appellate courts struggling under the heavy and increasing caseloads of the present day, the notion that courts might "drift" into the "unfortunate habit" of having too many en banc rehearings is quaint. En banc rehearings take a lot of judicial resources and no court of appeals is going to drift into the habit of having too many of them regardless of whether Rule 35(a) is amended.

Judge Adams of the Third Circuit also had a go at justifying the absolute majority requirement. The case was *Lewis v. Univ. of Pittsburgh*, 725 F.2d 910 (3d Cir.1983), and the vote was five for rehearing en banc, three against, and two disqualified, *id.* at 928-29 (opinion of Adams, J., on the petition for rehearing). Fearing that the result—denial of rehearing en banc when the vote was five to three in favor of it—"must appear quite unfair" to the losing litigant, Judge Adams attempted to explain the reason for the absolute majority requirement. *Id.* at 929. The "main reason" for the requirement, he said, "is that it insures that major developments in the law of the Circuit reflect the participation of all members of the Court." *Id.* But, of course, because of the prior panel precedent rule the absolute majority requirement does not do that at all. The decision of the panel majority, even if it was composed of only one active judge (or none), is the law of the circuit unless and until overruled en banc or by the Supreme Court. Coupled with

the prior panel precedent rule, the absolute majority requirement actually operates to make it more likely that the law of the circuit will not represent the views of a majority of the judges in active service. It does that by preventing the non-disqualified active judges from voting a case en banc in some circumstances even where they (because of their greater number) are more likely to reflect the views of the majority of judges in active service than those, if any, voting against en banc rehearing.

Judge Adams also suggested that lowering the absolute majority bar would lead to the law becoming more unsettled. *See id.* He gave as a hypothetical for his court, which had ten active members, the situation in which there were five recusals and a vote of three to two in favor of en banc rehearing. *See id.* Two things about that. First, Judge Adams did not explain why letting the law be decided by three active judges instead of by two would unsettle it. Perhaps the assumption is that en banc rehearings are unsettling, and therefore the fewer of them the better. But leaving a panel opinion in place, particularly if en banc review is sought because the panel opinion conflicts with one or more prior panel decisions, or with a Supreme Court decision, can also unsettle the law. Second, the argument that the absolute majority requirement promotes stability in the law by reducing the number of en banc rehearings knows no end. If cutting down on the number of en banc rehearings is the goal, why limit the effort to recusal situations? Why not raise the bar in all cases by requiring the vote of some super majority, such as three-fifths or three-fourths, of all active judges?

Rule 35(a) should be clarified through amendment, because the circuits are split eight to five on the issue, *see* McKenna, *supra*, and there is no good reason why a uniform rule should not be followed in all the circuits. For example, both the Tenth Circuit and this circuit have twelve authorized

judgeships. If five active judges are disqualified and six of the remaining seven are convinced the panel decision should be corrected en banc, in the Tenth Circuit it will be. In this circuit, it will not be. A litigant who loses before a panel in this circuit should not be treated differently in terms of the basic en banc procedures than one who loses before a panel in the same circumstances in another circuit. The definition of "majority of the circuit judges who are in regular active service" should not vary with geography.

It is particularly unfortunate that the geographic lottery relating to Rule 35(a) has worked against en banc rehearing in this case, because this is an important case that may affect every person who uses wireless communication or Internet service in this country. The case comes to us on consolidated petitions for review filed by power companies from around the country and involves the competing interests of those companies, telephone companies, cable television companies, wireless communication companies, Internet service providers, and of course, consumers. A more national case could hardly be imagined. And, as the Department of Justice points out, "because this case arose on Hobbs Act review of FCC rules, it may present the last opportunity for *any* court to address the core, industry-shaping issues presented here." FCC's Petition for Panel Rehearing and Suggestion for Rehearing En Banc at 2. Yet the law on those industry-shaping issues of exceptional importance is decided not by a majority of the judges in active service on this Court but instead solely by one active judge of this Court joined by a senior judge from another court.

In his defense of the absolute majority requirement, Judge Mansfield said that it is not unfair, because "[i]n cases of exceptional importance, or where there is a conflict between circuits, it may be expected that the Supreme Court will grant certiorari and settle the questions in issue." *Zahn*, 469 F.2d at 1041. We will see.

APPENDIX F

47 U.S.C. § 224. Pole attachments

(a) Definitions

As used in this section:

(1) The term "utility" means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

(2) The term "Federal Government" means the Government of the United States or any agency or instrumentality thereof.

(3) The term "State" means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

(4) The term "pole attachment" means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

(5) For purposes of this section, the term "telecommunications carrier" (as defined in section 153 of this title) does not include any incumbent local exchange carrier as defined in section 251(h) of this title.

(b) Authority of Commission to regulate rates, terms, and conditions; enforcement powers; promulgation of regulations

(1) Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312(b) of this title.

(2) The Commission shall prescribe by rule regulations to carry out the provisions of this section.

(c) State regulatory authority over rates, terms, and conditions; preemption; certification; circumstances constituting State regulation

(1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f) of this section, for pole attachments in any case where such matters are regulated by a State.

(2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that—

(A) it regulates such rates, terms, and conditions; and

(B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments as well as the interests of the consumers of the utility services.

(3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments—

(A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attach ments; and

(B) with respect to any individual matter, unless the State takes final action on a complaint regarding such matter—

(i) within 180 days after the complaint is filed with the State, or

(ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

(d) Determination of just and reasonable rates; "usable space" defined

(1) For purposes of subsection (b) of this section, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

(2) As used in this subsection, the term "usable space" means the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment.

(3) This subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service. Until the effective date of the regulations required under subsection (e) of this section, this subsection shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide any telecommunications service.

(e) Regulations governing charges; apportionment of costs of providing space

(1) The Commission shall, no later than 2 years after February 8, 1996, prescribe regulations in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges. Such regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.

(2) A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

(3) A utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity.

(4) The regulations required under paragraph (1) shall become effective 5 years after February 8, 1996. Any increase in the rates for pole attachments that result from the adoption of the regulations required by this

subsection shall be phased in equal annual increments over a period of 5 years beginning on the effective date of such regulations.

(f) Nondiscriminatory access

(1) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.

(2) Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

(g) Imputation to costs of pole attachment rate

A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.

(h) Modification or alteration of pole, duct, conduit, or right-of-way

Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.

(i) Costs of rearranging or replacing attachment

An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way).

(June 19, 1934, c. 652, Title II, § 224, as added Feb. 21, 1978, Pub.L. 95-234, § 6, 92 Stat. 35 and amended Sept. 13, 1982, Pub. L. 97-259, Title I, § 106, 96 Stat. 1091; Oct. 30, 1984, Pub.L. 98-549, § 4, 98 Stat. 2801; Oct. 25, 1994, Pub.L. 103-414, Title III, § 304(a)(7), 108 Stat. 4297; Feb. 8, 1996, Pub.L. 104-104, Title VII, § 703, 110 Stat. 149.)

47 U.S.C. § 157. New technologies and services

* * * *

HISTORICAL AND STATUTORY NOTES

* * * *

Advanced Telecommunications Incentives

Pub.L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, provided that:

"(a) In general.—The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local

telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

"(b) Inquiry.—The Commission shall, within 30 months after the date of enactment of this Act [Feb. 8, 1996], and regularly thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

"(c) Definitions.—For purposes of this subsection:

"(1) Advanced telecommunications capability.—The term 'advanced telecommunications capability' is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

"(2) Elementary and secondary schools.—The term 'elementary and secondary schools' means elementary and secondary schools, as defined in paragraphs (14) and (25), respectively, of section 14101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801) [section 8801(14) and (25) of Title 20, Education]."

APPENDIX G

The following is a list of parties to the Eleventh Circuit proceedings that are not listed in the caption of the decision below (see Appendix A): -

Arizona Cable and Telecommunications Association

AT&T Corp.

BellSouth Corporation

Georgia Power Company

GTE Service Corporation

Houston Lighting and Power Company

MCI Telecommunications Corporation

National Cable Television Association, Inc.

Nevada Bell

Pacific Bell

Pennsylvania Cable and Telecommunications Association

Public Service Electric and Gas Company

SBC Communications Inc.

Southern Company Services, Inc.

Southwestern Bell Telephone Company

U S WEST, Inc.

Supreme Court, U.S.
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(2) (3)

Nos. 00-832, 00-843

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

GULF POWER COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Pole Attachments Act, 47 U.S.C. § 224, grants the Federal Communications Commission ("FCC") jurisdiction to regulate pole attachments used for commingled cable and Internet service.

2. Whether the Pole Attachments Act grants the FCC jurisdiction to regulate attachments of wireless telecommunications equipment.

RULE 29.6 STATEMENT

Respondents Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company and Savannah Electric Power Company are wholly-owned subsidiaries of The Southern Company.

Respondent American Electric Power Service Corporation is a wholly-owned subsidiary of American Electric Power Company, Inc.

Respondents Atlantic City Electric Company and Delmarva Power & Light Company are wholly-owned subsidiaries of Conectiv, a publicly-owned company.

Respondent Commonwealth Edison Corporation is a wholly-owned subsidiary of Exelon Corporation.

Respondent Duke Energy Corporation has no parent or publicly-owned company owning 10% or more of the corporation's stock.

Respondent Florida Power & Light Company, Inc. is a wholly-owned subsidiary of FPL Group, Inc.

Respondent Potomac Electric Power Company is a publicly-owned company that has no parent company.

Respondent Public Service Electric & Gas Company is a wholly-owned subsidiary of Public Service Enterprise Group Incorporated, a publicly-owned company.

Respondent TXU Electric Company, formerly known as Texas Utilities Electric Company, is a wholly-owned subsidiary of TXU Corp, formerly known as Texas Utilities Company.

Respondent Tampa Electric Company is a wholly-owned subsidiary of TECO Energy, Inc., a publicly held company.

Respondent Virginia Electric & Power Company is a wholly-owned subsidiary of Dominion Resources, Inc., a publicly-owned company.

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COUNTERSTATEMENT OF THE CASE

The Pole Attachments Act, Pub. L. No. 95-234, § 6, 92 Stat. 35 (codified at 47 U.S.C. § 224) was enacted in response to a perceived danger of anti-competitive practices by utilities in connection with cable television service. *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987). Cable companies had complained there were no practical alternatives to stringing their cables on utility poles, and that some utilities (principally telephone companies) had exploited their "monopoly" position over these "bottleneck facilities" by charging excessive rates for pole attachments. S. Rep. No. 95-580, at 13 (1977). To address these concerns, Congress granted jurisdiction to the FCC to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. § 224(b)(1).[1] The Senate Report which accompanied the legislation explained that the FCC's new jurisdiction was "strictly circumscribed," S. Rep. No. 95-580, at 15, and would be triggered only "where space on a utility pole has been designated and is actually being used for communications services by wire or cable." S. Rep. No. 95-580, at 16. Congress implemented this jurisdictional restriction by defining a "utility" subject to the statute as "a person . . . who owns or controls poles, ducts, conduits or rights of way used, in whole or in part, for wire communications." 47 U.S.C. § 224(a)(1).

The Act established boundaries for the Commission's determination of rates for attachments by a cable television system, the lower end being the "additional costs of providing pole attachments," the upper end being the fully-allocated costs associated with the portion of the "usable space"

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[1] A specific grant of jurisdiction was necessary because the FCC had concluded the previous year it had no jurisdiction under existing law to regulate pole attachments. *California Water & Tel. Co.*, 64 F.C.C.2d 753, 758 (1977); *FCC v. Florida Power Corp.*, 480 U.S. at 248.

attributable to the pole attachment. 47 U.S.C. § 224(d)(1). The operative term in this formula, "usable space," was defined as "the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment." 47 U.S.C. § 224(d)(2).

An earlier version of the legislation would have granted the FCC jurisdiction to regulate "any attachment *for wire communication*," but was changed in the final bill at the behest of the FCC to "any attachment by *a cable television system*." H.R. Rep. No. 94-1630, at 2 (1976). Thus, as finally adopted, the Act was narrowly tailored to provide regulated rate coverage only to the then-fledgling cable industry, not to other entities that attach wireline facilities to utility poles.

In the late 1980's, cable companies began to provide services other than conventional video programming. In 1991, the FCC ruled that cable companies that provided commingled cable and telecommunications services over the same coaxial cable were entitled to a single, regulated rate under the Pole Attachments Act. That rule was upheld by the D.C. Circuit in *Texas Utilities Electric Co. v. FCC*, 997 F.2d 925, 927 (D.C. Cir. 1993).

The *Texas Utilities* decision created a regulatory anomaly, because cable companies that delivered telecommunications services were entitled to regulated rates for their pole attachments, but telecommunications companies seeking to deliver the same or similar services were not. In 1996, Congress addressed this regulatory anomaly by adding telecommunications carriers to Section 224 coverage as part of the larger Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. Congress accomplished this by expanding the definition of pole attachment from "any attachment by a cable television system" to "any attachment by a cable television system *or provider of telecommnications service*." 47 U.S.C. § 224(a)(4) (1994 & Supp. IV 1998)

(emphasis added). The 1994 Senate Report accompanying the legislation explains this change was "intended to remedy the anomaly of current law, under which cable systems providing telecommunications services are able to obtain a regulated pole attachment rate under Section 224 of the 1934 Act, while other providers of telecommunications services are unable to obtain a regulated pole attachment rate under Section 224." S. Rep. No. 103-367, at 65 (1994); *see also* H.R. Conf. Rep. No. 104-458, at 206 (1996). Congress did not extend Section 224 coverage to *all* telecommunications carriers, but rather excluded incumbent local exchange carriers. 47 U.S.C. § 224(a)(5) ("[f]or the purposes of this section, the term 'telecommunications carrier' * * * does not include any incumbent local exchange carrier"). Congress also made a number of other important changes to the Pole Attachments Act in 1996. These include the following:

First, whereas this Court had held in *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987), that access to utility poles under the 1978 Act was *voluntary* and thus not a violation of the Takings Clause of the Fifth Amendment, Congress made access *mandatory* by adding a new Section 224(f)(1), which provides that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. § 224(f)(1) (Supp. IV 1998).

Second, Congress prescribed two specific pole attachment rates to be established by the FCC. Before 1996, Section 224(d) had set forth a single standard for determining "just and reasonable" rates for attachments by a cable television system. In 1996, Congress provided that the Section 224(d) standard "shall apply to the rate for any pole attachment used by a cable television system *solely to provide cable service*." 47 U.S.C. § 224(d)(3) (Supp. IV 1998) (emphasis added). Congress also provided that the Commission "shall * * *

prescribe regulations in accordance with" a different standard "to govern the charges for pole attachments used by *telecommunications carriers* to provide *telecommunications services*." 47 U.S.C. § 224(e)(1) (Supp. IV 1998) (emphasis added).

The 1996 amendments did not change the Act's jurisdictional restriction to utilities which own or control facilities "used, in whole or in part, for any *wire communications*." 47 U.S.C. § 224(a)(1) (emphasis added). Nor did Congress change the definition of "usable space" as "the space above the minimum grade level which can be used for the attachment of *wires, cables, and associated equipment*." 47 U.S.C. § 224(d)(2) (emphasis added). Indeed, Congress applied this concept of "usable space" to attachments for telecommunications carriers through the new rate formula established in Section 224(e).[2]

To date, the FCC has implemented the 1996 amendments to the Pole Attachments Act in four separate rulemaking proceedings. This case involves one of those rulemaking proceedings. *Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole*

[2] The new Section 224(e) provides, in pertinent part:

* * * *

> (2) A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the *usable space* among entities so that such apportionment equals two-thirds of the costs of providing space other than the *usable space* that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.
>
> (3) A utility shall apportion the cost of providing *usable space* among all entities according to the percentage of *usable space* required for each entity.

(emphasis added).

Attachments, 13 F.C.C.R. 6777 (1998); Gov't Pet. App. D.[3] As pertinent here, the FCC determined that cable operators are entitled to the benefits of Section 224 when providing commingled Internet and traditional cable services. The Commission based this conclusion on the ground that it "is still obligated under Section 224(b)(1) to ensure that the 'rates, terms, and conditions [for pole attachments] are just and reasonable,' and, as Section 224(a)(4) states, a pole attachment includes 'any attachments by a cable television system.'" Gov't Pet. App. at 90a. Further, the Commission determined that the "just and reasonable rate for commingled cable and Internet service is the Section 224(d)(3) rate," Gov't Pet. App. at 87a, notwithstanding the statute's prescription that this rate shall apply to attachments used "solely to provide cable service." 47 U.S.C. § 224(d)(3) (Supp. IV 1998). The Commission explained that its decision was based solely on its regulatory authority under Section 224(b)(1), Gov't Pet. App. at 87a, and not on a determination of whether Internet service was a "cable service" or a "telecommunications service" under Section 224(d) or 224(e). The Commission stated it "need not decide at this time * * * the precise category into which Internet services fit," Gov't Pet. App. at 89a, although it noted it had concluded in an earlier proceeding that "Internet service is not the provision of a telecommunications service under the 1996 Act." Gov't Pet. App. at 87-88a. The Commission made one other holding in the rulemaking relevant here. It determined that the 1996 amendments extend the "benefits and protections" of Section 224 to attachments of wireless telecommunications equipment. Gov't Pet. App. at 94a.

[3] The FCC has completed one other rulemaking, which currently is on review in the Eleventh Circuit. *Southern Co., et al. v. FCC*, No. 99-15160GG and consolidated cases (11th Cir. filed Dec. 16, 1999) (argument pending).

Electric utility companies filed petitions for review of the FCC's order in the Third, Fourth, Sixth, Eighth, Eleventh, and D.C. Circuits. Pursuant to the FCC's motion (not, as NCTA asserts, pursuant to a random lottery), the cases were consolidated in the Eleventh Circuit. The panel reversed the FCC's conclusions that the Pole Attachments Act, as amended in 1996, covers attachments used for commingled cable and Internet service, as well as the FCC's determination that the Act covers attachments of wireless telecommunications equipment.

REASONS FOR DENYING THE WRIT

I. THE ELEVENTH CIRCUIT'S HOLDING ON ATTACHMENTS FOR COMMINGLED CABLE AND INTERNET SERVICE DOES NOT WARRANT REVIEW

The first ground on which the petitions seek review is that the court of appeals incorrectly interpreted the Pole Attachments Act not to extend to attachments for commingled cable and Internet service. Petitioners claim this holding ignores the plain language of Section 224(b)(1)'s general grant of power to the FCC to regulate pole attachments, as well as the national policies articulated by Congress in Sections 706 and 509 of the Telecommunications Act of 1996 to promote the deployment of advanced telecommunications services. The petitions assert that without regulation, utilities will exercise "monopoly" power over "bottleneck facilities" to charge excessive amounts for pole attachments, and thus will impair the deployment of broadband Internet access throughout this country.

None of these claims is sustainable, and none warrants review by this Court. The petitions gloss over the fact that in 1996, Congress changed the Pole Attachments Act to authorize the FCC to establish rates for pole attachments in two specific cases, one where the attachment is for "solely

cable service" under Section 224(d), the other where the attachment is for "telecommunications service" under Section 224(e). *No other rates are authorized.* Congress' general policy pronouncements do not provide such authorization; to the contrary, Congress specifically excluded the country's major providers of Internet service, the incumbent local exchange carriers ("ILECs"), from rate coverage for pole attachments in Section 224(a)(5). Facilities-based Internet service providers which are neither cable companies nor telecommunications carriers also are not covered. While the cable television industry may desire a "subsidy" not enjoyed by its major competitors through artificially low, regulated rates, their proper appeal for such relief is to Congress, not to the courts.

Denial of the petitions will simply leave the cable industry paying the same unregulated rates ILECs and facilities-based Internet service providers must pay for Internet attachments. Indeed, because the now-mandatory Section 224 effects a takings, *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999), utility companies are Constitutionally entitled to charge a market rate for attachments. *E.g., United States v. 564.64 Acres of Land*, 441 U.S. 506 (1979). This will not be affected one way or another by a decision regarding Section 224 coverage. To be sure, cable attachment rates will go up, but not by much relative to other components of their cost structures, since pole attachment rental rates represent a small fraction of total cable company costs.

Review of this case would force this Court into a premature determination of whether cable Internet service is a "cable service" or a "telecommunications service." The FCC has previously determined that Internet service is an "information service," and not a "telecommunications service." However, in the wake of the Eleventh Circuit's ruling in this case, the FCC is apparently rethinking its position, opening a

rulemaking specifically for the purpose of determining the proper classification of cable Internet service. *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, FCC No. 00-355; GN Docket No. 00-185 (Sept. 28, 2000). The FCC's notice of inquiry (which has yet to proceed through the comment and reply process) is reproduced in the Appendix to this Brief in Opposition ("App."). Until the FCC, as a rulemaking body, considers the public comments and replies, reconsiders the issue and takes a clear position on the appropriate classification of the provision of Internet service, this Court should abstain from being drawn into this debate.[4]

A. The Court of Appeals' Holding Is Correct

The court of appeals' holding that Section 224 does not cover commingled cable and Internet service is correct. This case involves four subsections of the Pole Attachments Act. The first is Section 224(b)(1)'s general grant of power to the FCC to regulate the "rates, terms and conditions for pole attachments." The second is Section 224(a)(4)'s definition of "pole attachment" as "any attachment by a cable television system or provider of telecommunications service." The third and fourth are the specific standards directing the manner in which the FCC shall exercise its Section 224(b)(1) regulatory power: Section 224(d) for "any attachment used by a cable television system *solely to provide cable service*;" and Section 224(e) for "pole attachments used by *telecommunications carriers* to provide *telecommunications services*." The court of appeals held that all four provisions must be read together; thus, "[f]or the FCC to be able to regulate the rent for an attachment that provides Internet service * * * Internet service must qualify either as a cable

[4] Of course, the FCC's discretion in this regard is circumscribed by the clear language of the Act and once their rulemaking is complete, it then must withstand judicial review.

service or a telecommunications service." Gov't Pet. App. at 27a; 208 F.3d at 1276. The court explained:

> The straightforward language of subsections (d) and (e) directs the FCC to establish two specific just and reasonable rates, one for cable television systems providing solely cable service and one for telecommunications carriers providing telecommunications service; *no other rates are authorized.*

Gov't Pet. App. at 27a; 208 F.3d at 1276 n.29 (emphasis added).

The court of appeals correctly held that the FCC's general grant of power in Section 224(b)(1) to regulate pole attachments is *defined and limited* by the specific standards set out in subsections (d) and (e) for attachments used for cable service and telecommunications service. As this Court has repeatedly observed, it is a "commonplace of statutory construction that the specific governs the general." *Morales v. TWA*, 504 U.S. 374, 384-85 (1992), *citing Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987).

Petitioners argument that Section 224(b)(1)'s general grant of power to regulate pole attachments is *not* limited by subsections (d) and (e) is without merit. Congress established highly detailed standards in subsections (d) and (e) to set boundaries on the FCC's exercise of its power to establish just and reasonable rates for cable and telecommunications attachments. Congress can not reasonably be assumed to have provided these highly detailed standards for cable and telecommunications attachments, yet to have provided *no* standards for attachments for *other* services (including Internet services). Indeed, reading the Act to grant an unbounded, standardless power to regulate rates for *other* services would bring into question whether the statute violates the non-delegation doctrine, which a proper reading would avoid. *National Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974) (reading statutory grant of

power used by FCC to impose fees on cable television industry narrowly to avoid non-delegation questions).

Ironically, the implausibility of severing the Commission's general grant of regulatory power under Section 224(b)(1) from the implementing standards set out in subsections (d) and (e) is underscored by the Commission's very attempt to exercise its Section 224(b)(1) power. The Commission undertook its analysis in two steps. First, it determined whether it had the power to regulate commingled cable and Internet attachments, then it considered what rate would apply. In the first step, the Commission bifurcated the statute and determined that Section 224(b)(1), standing alone, empowers it to regulate commingled cable and Internet attachments. In the second step, however, the FCC yoked the statute back together, turning to the specific standards established by Congress to conclude that the "just and reasonable rate for commingled cable and Internet service is the Section 224(d)(3) rate." Gov't Pet. App. at 87a. Setting aside that the Section 224(d)(3) rate applies to attachments *solely to provide cable service* (which commingled cable and Internet attachments are not), this exercise shows that in practice, the FCC found itself compelled to use the standard set by Congress in Section 224(d) to implement its Section 224(b)(1) power. The Act is no more severable as a practical matter than it is as a matter of law.

B. There Is No Conflict Between The Eleventh Circuit's Decision And The D.C. Circuit's Decision In Texas Utilities

Contrary to Petitioners' argument, the Eleventh Circuit's ruling does not conflict with the D.C. Circuit's decision in *Texas Utilities Electric Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993). Texas Utilities interpreted Section 224 as it existed *prior* to the 1996 amendments; the Eleventh Circuit's decision interprets Section 224 *after* the 1996 amendments. As the Eleventh Circuit observed, the amended statute

presents "an entirely different situation" from that faced by the D.C. Circuit in *Texas Utilities*. Gov't Pet. App. at 30a, 208 F.3d at 1277 n.32. Prior to 1996, Section 224 instructed the FCC to set a reasonable rent for "any attachment by a cable television system." 47 U.S.C. § 224(a)(4)(d)(1). It did not specify the particular services of a cable television system that were entitled to a regulated rent, and thus the court deferred to the FCC's interpretation that commingled cable and telecommunications services were covered. The 1996 amendments changed the situation entirely by specifying in subsections (d) and (e) that "solely cable services" and "telecommunications services" are to receive regulated rents. As the Eleventh Circuit correctly explained in its opinion, to suggest there is a conflict with *Texas Utilities* is to ignore the fact that Congress changed the law in 1996.

C. The Eleventh Circuit's Decision Is Fully Consistent With Congress' Policy Of Promoting Deployment Of High Speed Services

Contrary to Petitioners' claim, the Eleventh Circuit's conclusion that the Pole Attachments Act does not cover commingled cable and Internet service is fully consistent with the national policies articulated by Congress regarding the promotion of the Internet and the development of advanced telecommunications capability. In Section 706 of the 1996 Act, Congress directed the Commission to "encourage the deployment * * * of advanced telecommunications capability to all Americans * * * by * * * regulating methods that remove barriers to infrastructure investment. 47 U.S.C. § 157, statutory note. In addition, in Section 509 of the 1996 Act, Congress stated "[i]t is the policy of the United States * * * to promote the continued development of the Internet and other interactive computer services and other interactive media." 47 U.S.C. § 230(b)(1). According to Petitioners, these two sections support the proposition that Congress cannot have intended to "penalize" the cable industry by

eliminating rate regulation for attachments used by cable companies for the delivery of high speed Internet services.

Petitioners, however, conspicuously leave out the fact that in 47 U.S.C. § 230(b)(2), Congress further declared that "[i]t is the policy of the United States * * * to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*." 47 U.S.C. § 230(b)(2) (emphasis added). Moreover, the fact that Section 224 coverage does not extend to Internet service attachments merely levels the competitive playing field for the delivery of Internet service. Since 1978, the cable television industry has been subsidized by electric utility ratepayers through artificially low, regulated rates for pole attachments. In 1996, Congress extended this "subsidy" to telecommunications carriers, but *excluded* incumbent local exchange carriers, 47 U.S.C. § 224(a)(5), and facilities-based Internet service providers which are not cable companies or telecommunications carriers. Incumbent local exchange carriers are the cable industry's largest competitors in the delivery of Internet service.[5] Cable companies and their chief competitors in the Internet business thus must pay the same unregulated rates for Internet attachments, as must facilities-

[5] The FCC recently reported that "[m]ost residential and small business consumers currently receive Internet service from ISP's via traditional 'dial-up' telephone services provided by local exchange carriers (LECs) over copper wire." *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, FCC No. 00-355, GN Docket No. 00-185 (Sept. 28, 2000). In the area of high-speed Internet access, of the 4.3 million broadband lines the FCC recently reported to be connecting homes and small businesses to the Internet, nearly 1 million are served by asymmetric digital subscriber lines (ADSL) provided by local exchange carriers. FCC, *Federal Communications Commission Releases Data on High-Speed Services for Internet Access*, at 2 (Oct. 31, 2000). Moreover, the number of customers served by local exchange carriers increased 157% during the first half of 2000, *id.*, a trend which can be expected to continue.

based Internet service providers. Surely it is not reasonable to assume that Congress intended *sub silentio* to "subsidize" the cable industry's provision of high-speed Internet service, while simultaneously excluding this "subsidy" for their principal competitors. That conclusion would be anathema to a "free market . . . *unfettered by Federal or State regulation*." 47 U.S.C. § 230(b)(2) (emphasis added).

D. This Is Not The Proper Case To Determine The Regulatory Classification Of Internet Service.

Granting the petitions will force this Court into a premature consideration of the proper regulatory classification of Internet service. Petitioners contend that this Court can overrule the court of appeals simply on the basis that Section 224(b)(1)'s general grant of power to regulate pole attachments covers Internet service, without ever reaching the issue of whether Internet service falls under the formulas for "solely cable service" or "telecommunications service" set out in Sections 224(d) and (e). Controlling principles of statutory construction, however, dictate that the statute must be read as a whole, *United States v. Morton*, 467 U.S. 822, 828 (1984), and that "the specific governs the general," *Morales v TWA*, *supra*, 504 U.S. at 384-85. Thus, as the court of appeals correctly held, resolution of this case would require this Court to rule on whether Internet service is a "cable service" or a "telecommunications service." The resolution of that issue, however, presents ramifications for controversies well beyond the scope of this proceeding and with far greater and more pervasive implications than pole attachments.

As the Government's petition concedes, the proper regulatory classification of Internet service "is central to a separate debate concerning whether a cable operator can be compelled to provide unaffiliated Internet service providers with 'open access' to its cable facilities." Gov't Pet. at 15 n.4. The FCC has recently opened a rulemaking proceeding

specifically for the purpose of developing a "national legal and policy framework" to classify Internet service. *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, FCC No. 00-355, GN Docket No. 00-185 (Sept. 28, 2000). App. at 2a-3a. This is necessary, in part, to clarify the FCC's prior decisions on the issue. In one proceeding, the FCC defined the Internet as an information service. *In the Matter of Federal-State Joint Board on Universal Service*, 13 F.C.C.R. 11501, 11532-11533 (1998) ("Internet service providers themselves provide information services"). The FCC has also said that Internet service is not a telecommunications service. *See* Gov't Pet. App. at 87a ("The Universal Service Order concluded that Internet service is *not* the provision of a telecommunications service under the 1996 Act"); *In the Matter of Federal-State Joint Board on Universal Service*, 12 F.C.C.R. 87, 123 (1997) ("Internet service does not meet the statutory definition of a 'telecommunications service'").

The courts are also beginning to address the proper classification of Internet service in the context of the cable "open access" debate. The Ninth Circuit has held that cable modem service is a "telecommunications service." *AT&T Corp. v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000), while a district court in Virginia has held that cable modem service is a "cable service." *MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712 (E.D.Va. 2000) (appeal pending). Other cases are expected to follow. *See generally*, Christopher E. Duffy, Note: *The Statutory Classification of Cable-Delivered Internet Service*, 100 Colum. L. Rev. 1251 (2000).

In reviewing the rulemaking at issue here, the Eleventh Circuit merely applied the FCC's existing pronouncements about the nature of Internet services as it found them. This Court should therefore allow the question of the regulatory status of the Internet to be addressed by the FCC in its ongoing rulemaking proceeding (or by Congress) and the

courts, rather than make this decision preemptively in this case.[6] This is simply the wrong case for ruling on the regulatory status of the Internet, and this Court is the wrong forum. The determination should be made in the first instance by the policy-making branches of government, on the basis of a full and complete record, not by this Court.

E. There Will Be No Harm To The Deployment Of High Speed Internet Services If The Petitions Are Denied

Petitioners also allege that denial of their petitions will have "immense practical consequences" and "deprive the American public of the competitive provision of communications services." This is simply not true, for several reasons. First, the changes made by the 1996 amendments only mean that the cable industry loses its "subsidy" when it moves into the business of delivering high-speed Internet services, thus leaving the cable industry to pay the same unregulated rates as its competitors with respect to Internet attachments. Although NCTA no doubt would prefer a regulatory regime that provides cable operators with preferred rates for pole attachments used to provide Internet services, there is no reason to believe that requiring them to pay the same rates as their competitors will cause them to cease to provide high speed Internet services or place "substantial private and public national interests in jeopardy." NCTA Pet. at 24.

Second, because the Pole Attachments Act is now mandatory and thus effects a takings, *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999), utilities are entitled to just compensation for *all* pole attachments,

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[6] A premature classification by the Court might also affect the "open access" terms of the consent order recently accepted by the Federal Trade Commission in the AOL/Time Warner merger. *In the Matter of America Online, Inc. and Time Warner*, Docket No. C-3989 (FTC Dec. 14, 2000).

including commingled cable/Internet. Utilities thus are *Constitutionally* entitled to charge a market rate for pole attachments, irrespective of Section 224 coverage. *E.g.*, *United States v. 564.64 Acres of Land*, 441 U.S. 506 (1979). As such, there will be *no* practical consequences of a denial of the petitions, since cable companies will be charged a market rate for commingled cable/Internet attachments in any event. To be sure, payment of market rates for pole attachments will add to cable companies' costs, but not by much: pole attachment rental costs represent a very small percentage of the cost structure of cable companies, less than one percent in most cases. *See*, *e.g.*, Cablevision Systems Corporation, 1999 SEC Form 10-K at 33, 82 (pole rental fees 0.3% of total operating expenses). Moreover, increased pole attachment rental costs will be offset by increased revenues generated by the new Internet service offered by the cable companies.

Third, while utility poles and conduits arguably may have been bottleneck facilities in the past and in some places, they are almost never bottleneck facilities today. Cable companies almost always have alternatives for the deployment of facilities to provide high-speed Internet access. First, there are a variety of wireless options, including terrestrial wireless and satellite. Second Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in A Reasonable And Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, ¶¶ 16-18 (FCC Aug. 21, 2000). In addition, the simplest and most widely-used alternative is direct burial. The most recent FCC statistics show that more than 50% of the wireline facilities of local exchange carriers are buried underground. FCC, 1999 Statistics of Common Carriers, at 15 (Aug. 11, 2000). In cities across the country, from Tacoma, Washington to Washington, D.C., downtown streets are being cut to accommodate new fiber optic cable

being laid.[7] In addition, nearly all electric, cable and communications wires in new residential and commercial developments are buried directly underground, and do not use utility poles or conduits. States and municipalities across the country require newly installed cable television transmission facilities to be constructed underground, and many areas of the country are taking steps to require the placement underground of existing aerial facilities.[8]

In short, today, utility poles and conduits are almost never bottleneck facilities for the delivery of high-speed Internet services. Petitioners' predictions of dire consequences if the court of appeals' ruling is left standing are unfounded.

For all of the above reasons, the court of appeals' holding regarding commingled cable and Internet attachments does not warrant review by this Court.

II. THE ELEVENTH CIRCUIT'S WIRELESS HOLDING DOES NOT WARRANT REVIEW

The court of appeals' ruling that Section 224 does not cover attachments of wireless telecommunications equipment

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[7] *See*, *e.g.*, Marcelene Edwards, *Need For Speed Faces Competition: MetroMedia and AT&T Join Others Laying Fiber Optic Cables For Internet Access Downtown*, The News Tribune (Tacoma, Washington), July 26, 2000, at D1; Stephen C. Fehr, *Road Kill on the Information Superhighway: Rise of Underground Cable Tears Up the District's Streets*, The Washington Post, Mar. 21, 1999, at A1.

[8] For example, the state of Washington has declared that "the conversion of overhead electric and communication facilities to underground facilities is substantially beneficial to the public safety and welfare," and is "in the public interest." Wash. Rev. Code. § 66.88.410 (2000). Los Angeles, California, also requires that utility lines including cable television, be installed underground in designated zones. Los Angeles, Calif., Zoning and Land Regs. §17.05(N) (1962).

also does not warrant further review.[9] Unlike the commingled cable/Internet issue, the court's wireless holding has generated no visible interest from the wireless industry. Not a single wireless company participated in this case at the court of appeals, nor has any wireless company supported the Government's petition. Indeed, the Government itself has addressed this issue as an afterthought, devoting minimal space to it both in the court of appeals and in its petition. In addition, the petitions do not even allege there is a split in the Circuits on the wireless issue. These factors alone suggest the wireless issue is unworthy of the Court's attention.

Petitioners' argument for certiorari is that the court of appeal's holding is incorrect. This argument is without merit. The Pole Attachments Act is designed to deal with the potential exercise of monopoly power over bottleneck facilities. Utility poles are not, *even potentially*, bottleneck facilities for wireless equipment. Wireless equipment can be sited on virtually any tall building or structure, such as rooftops, communications towers, water towers, monopoles, billboards, highway light structures, church steeples, etc. Indeed, an entire commercial industry has emerged which is dedicated to siting wireless equipment. As the court of appeals stated, it is "beyond question * * * that utility poles are not bottleneck facilities for wireless systems." Gov't Pet. App. at 25a; 208 F.3d at 1275. Because they are not, the court of appeals properly held Section 224 does not cover wireless attachments.

The Government claims this reasoning to be a "policy" judgment by the lower court. Gov't Pet. at 20. It is not. It is simply reading the Act in a manner consistent with its express

[9] Wireless attachments to poles "include an antenna or antenna clusters, a communications cabinet at the base of the pole, coaxial cables connecting antennas to the cabinet, concrete pads to support the cabinet, ground wires and trenching, and wires for telephone and electric service." Gov't Pet. App. at 24a.

terms and Congressional purpose, two of the elementary principles of statutory construction. It is also the exercise of common sense: what earthly reason would Congress have to establish a low, regulated rate (typically around $6 a year) for attachments of wireless equipment to utility poles, when there is a thriving commercial market across the country for wireless sites at $1000-$2000 (or more) a *month?*

Congress' intent to limit the Act to wireline attachments is readily discernable from a variety of sources. The Act was originally drafted to cover "any attachment for *wire communication*," though it was changed prior to enactment to cover just one particular class of users of wire communications (cable television companies) at the behest of the FCC. *See Texas Utils. Elec. Co. v. United States*, 997 F.2d at 925. The jurisdictional grant to the FCC was defined in terms of wire communications. Section 224(a)(1) ("utility" means any person who owns facilities "used, in whole or in part, for *wire communications*"). The Senate Report explained this meant that Federal jurisdiction would be triggered only "where space on a utility pole has been designated and is actually being used for communications services by *wire or cable*." S. Rep. No. 95-580, at 16 (emphasis added). Further, Congress defined the standard the FCC was to use in determining the attachment rate in terms of the "usable space" on the pole, which it defined as the "space above the minimum grade level which can be used for the attachment *of wires, cables, and associated equipment.*" 47 U.S.C. § 224(d)(2) (emphasis added).

The only pertinent change Congress made in 1996 was to add telecommunications carriers to Section 224.[10] Congress

[10] There is not a single mention of wireless telecommunications in Section 703 of the 1996 Act, which amended Section 224, or in the legislative history. However, Congress did deal with wireless equipment in the *next* section of the 1996 Act, Section 704. P.L. No. 104-104, § 704, 47 U.S.C. § 332.

did not change the basic structure or purpose of the Act, nor did it change the jurisdictional restriction to utilities who own or control poles "used, in whole or in part, for *wire communications*." 47 U.S.C. § 224(a)(1). Congress also did not change the definition of usable space, which continues to mean space which can be used "for the attachment of *wires, cables, and associated equipment*." 47 U.S.C. § 224(d)(2). More importantly, Congress applied this term in the new formula established in Section 224(e) for attachments by telecommunications carriers. If attachments of wireless equipment are covered at all, they are covered under this formula. But this formula is defined in terms of *wires, cables and associated equipment*. It cannot be reasonable to assume that Congress would define a formula in terms of *wires, cables, and associated equipment* if it intended to cover *wireless* equipment. The court of appeals' holding is correct; review is unwarranted.[11]

CONCLUSION

The petitions for a writ of certiorari should be denied.

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[11] The Government also claims that the court of appeals' reasoning is flawed as a factual matter, since wireless providers use wireline facilities in certain segments of their networks. Gov't Pet. at 20-21. This claim is also without merit. Despite some language to the contrary, the court of appeals' opinion is best read to hold that Section 224 coverage does not extend to attachments of *wireless equipment*. To the extent a wireless carrier seeks to attach a wireline facility to a utility pole, this wireline attachment is covered by Section 224. This was the position taken by the electric companies in the court of appeals, and we believe it to be the holding of the court's opinion. In the event there is confusion on this point at some later date, the Eleventh Circuit or another lower court is fully capable of clarifying this issue.

Respectfully submitted,

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APPENDIX

APPENDIX

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

GN Docket No. 00-185

In the Matter of

Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities

NOTICE OF INQUIRY

Adopted: September 28, 2000
Released: September 28, 2000

Comment Date: 45 days after publication in the Federal Register

Reply Comment Date: 75 days after publication in the Federal Register

By the Commission:

I. INTRODUCTION

1. The convergence of technologies that allows the provision of high-speed services over traditional cable television facilities, telecommunications lines, and other facilities raises several fundamental questions concerning the Commission's traditional approaches to such technologies. In this proceeding, the Commission will explore issues

surrounding high-speed access to the Internet provided to subscribers over cable infrastructure, so-called "cable modem services."[1] Specifically, we seek to determine what regulatory treatment, if any, should be accorded to cable modem service and the cable modem platform used in providing this service. We also seek comment on the impact of our approach on other providers of high-speed services.

2. Underlying our inquiry here are several complementary goals. One of the Commission's objectives under the Communications Act of 1934, as amended (the Act), is to promote widespread and rapid deployment of high-speed services, while at the same time to preserve and promote the "vibrant and competitive free market" that exists for the Internet.[2] With these objectives in mind, we seek to create a legal and policy framework for cable modem service and the cable modem platform that will foster competitive deployment of new technologies and services by all entities,

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[1] Several terms, such as cable broadband, cable modem service, and cable Internet, have been used to describe high-speed services, most notably Internet services, using cable modem technologies. We refer in this Notice to "cable modem service," without intending to prejudge any of the classification questions presented herein, when referring to the Internet services that are provided to end user subscribers using cable modem technologies. Similarly, we use the term "cable modem platform" to single out the underlying facilities used to provide the cable modem service. Cable modem technologies rely on the basic cable television network architecture but with upgrades and enhancements to support high-speed services. *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Second Report, FCC 00-290 (rel. Aug. 21, 2000) (*Second 706 Report*).

[2] *See* 47 U.S.C. § 230(b)(2); 47 U.S.C. § 157; Sec. 706, Pub. L. 104-104, Title VII, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. §157.

including cable operators and Internet service providers (ISPs) alike. We seek to instill a measure of regulatory stability in the market to encourage investment in all types of high-speed networks and innovation in high-speed services. It is particularly important to develop a national legal and policy framework in light of recent federal court opinions that have classified cable modem service in varying manners.[3] Accordingly, we seek in this Notice of Inquiry (NOI) to develop a full record to assess the legal issues and marketplace developments surrounding cable modem service and access to the cable modem platform, to address whether to establish a national policy with respect to the treatment of high-speed services, and to determine how a national policy will advance the goals Congress set forth in section 706 and other provisions of the Telecommunications Act of 1996 (1996 Act).

3. To the extent that the creation of competitive market conditions depends upon competition between all providers of high-speed services, the Commission seeks to develop a record that examines the full range of high-speed service providers, including providers that use cable, wireline, wireless, satellite, broadcast, and unlicensed spectrum[4] technologies. This Commission has jurisdiction over all interstate communications services, including the high-speed

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[3] *Compare AT&T Corp. v. City of Portland*, 216 F.3d 871, 877 (9th Cir. 2000) (*City of Portland*) (holding that cable modem service comprises both a "telecommunications service" and an "information service.") *with Gulf Power Co. v. FCC*, 208 F.3d 1263, 1275-78 (11th Cir. 2000) (holding that Internet service is neither a cable service nor a telecommunications service) *and MediaOne Group, Inc. v. County of Henrico*, 97 F.Supp.2d 712, 714 (E.D. Va. 2000), *appeal pending*, 4th Cir. No. 00-1680 (concluding that cable modem service is a cable service).

[4] *See* 47 C.F.R. § 15.301 *et seq.*; 47 C.F.R. § 15.401 *et seq.* *See also Second 706 Report* at ¶ 55.

services offered by such providers.[5] In exercising this jurisdiction, the Commission has sought to reduce barriers to entry, encourage investment, and facilitate the deployment of high-speed services.

4. The Commission has heretofore taken a "hands-off" policy with respect to the high-speed services provided by cable operators. This regulatory restraint has been premised, in part, on the belief that "multiple methods of increasing bandwidth are or soon will be made available to a broad range of customers."[6] Nonetheless, this Commission has stated that it would revisit this policy "if competition fails to grow as expected" in the provision of high-speed services.[7] We therefore ask several questions in this proceeding to ascertain whether our hands-off policy for high-speed services provided by cable operators remains the correct approach and how the Commission might introduce a national policy framework for regulating high-speed services. In light of factors such as the differing treatment accorded different providers and services

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[5] *See* 47 U.S.C. § 151 (interstate and foreign communications by wire or radio); 47 U.S.C. § 521 *et seq.* (cable communications providers); 47 U.S.C. § 201 *et seq.* (common carriers); 47 U.S.C. § 332 (wireless telecommunications providers).

[6] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398, 2448 at ¶ 101 (1999) (*First 706 Report*). To fulfill its mandate under section 706 of the 1996 Act, the Commission indicated that it would "continue to monitor closely the deployment of broadband to all Americans." *Id.* at ¶ 98.

[7] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 99-251, Memorandum Opinion and Order, FCC 00-202, at ¶ 121 (rel. June 6, 2000) (*AT&T/MediaOne Order*).

under the Act itself, however, we note that this national framework may or may not impose the same regulatory obligations on all providers.

II. BACKGROUND

5. Cable modem technology is among several different means by which consumers may obtain high-speed access to the Internet. Before inquiring into the appropriate legal classification of cable modem service and/or the cable modem platform, as well as alternative policy approaches to achieving vibrant competition and improving consumer access to high-speed services, we describe briefly the development of high-speed services and the Commission's treatment of such services to date. We also describe how federal courts have analyzed the regulatory status of cable modem service.

A. Evolution Of High-Speed Services

6. Most residential and small business consumers currently receive Internet service from ISPs via traditional "dial-up" telephone services provided by local exchange carriers (LECs) over copper telephone lines. Customers purchase telephone services from LECs at standard tariffed prices and use such services to gain access to ISPs, and, through them, the Internet. This "last mile" transmission capability is available independently of the choice of ISP. In these dial-up arrangements, customers use modems with their computers that are connected to their telephone lines. Increasingly, customers are using the local telephone network to obtain high-speed access to the Internet through xDSL technologies provided by incumbent and competitive LECs.[8] In fact, in our recent *Second 706 Report*, we found significant growth in

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[8] While there are multiple variations of xDSL, the most common form of xDSL used by residential customers is asymmetric DSL or ADSL. *See Second 706 Report* at ¶ 36.

advanced services provided to residential and small business customers by LECs between 1998 and 1999.[9]

7. In recent years, industry investment in infrastructure to support high-speed services has increased dramatically, driven in part by the rapidly rising demand for such services.[10] Service providers are deploying a variety of networks that rely on different network architectures and transmission paths, including copper wire, cable, terrestrial wireless radio spectrum, satellite radio spectrum, or a combination of these and other media, to provide high-speed services. In the coming years, analysts predict rapid growth in subscribership of high-speed services provided using each of these technologies.[11]

8. In particular, a number of cable television operators, both incumbents and new entrants, have started offering access to the Internet over their cable plant.[12] These services provide access with much higher transmission speeds than traditional dial-up services and are offered primarily to residential customers over the cable systems' shared media hybrid fiber coaxial networks.[13] The coaxial cable transmits

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[9] *See id.* at ¶ 72.

[10] *Id.* at ¶¶ 185-202.

[11] *Id.*

[12] The incumbent cable operators and new entrants that offer this service can be part of either small, independent companies or large, nationwide companies (sometimes called Multiple System Operators or MSOs). Some local communities, for example, have built cable systems to compete with the incumbent, and these municipal systems increasingly offer high-speed Internet services. *See Second 706 Report* at ¶ 140. Open Video System (OVS) operators similarly could offer Internet services over cable plant. *See* 47 U.S.C. § 571(a)(3)-(4).

[13] *See Second 706 Report* at ¶ 29; *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket

signals to the cable modem, which, in turn, is connected to the computer. For the return path, some cable modem services require the customers' computers to send signals upstream over traditional dial-up telephone connections. With more advanced cable modem networks, both directions of traffic are transmitted via the coaxial cable, which permits the connection to be open at all times and offer higher transmission speeds.

9. In general, ISPs receive communications from their customers' computers and route the communications to other computers connected either to their networks or other networks. Some ISPs often combine their services with proprietary or non-proprietary content.[14] In other words, they often compete as content providers as well as ISPs. Those ISPs that combine content with Internet service are sometimes referred to as online service providers (OSPs).[15] America Online (AOL), Microsoft Network, and Prodigy Communications Corporation all provide content as OSPs; AOL is the largest OSP in the United States.[16]

10. Cable operators offering high-speed access to the Internet often provide the underlying transmission, the Internet service, and proprietary content, much like that

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No. 98-178, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3194 ¶ 71 (1999) (*AT&T/TCI Order*).

[14] *See* Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past* (OPP Working Paper Series No. 30, 1998) at 17-18. By "proprietary content" we mean content that an online service provider offers on its network exclusively to its own customers.

[15] Although we identify OSPs here and in other parts of the NOI where the questions pertain specifically to ISPs that provide content, our general use of the term "ISP" in this NOI is meant to include OSPs as well.

[16] *See* Patricia Fusco, *Top 12 ISPs by Subscriber*, http://www.ISP-planet.com/research/ISP_071000.html (viewed Aug. 21, 2000); http://www.jetcafe.org/~npc/isp/large.html (viewed Aug. 21, 2000).

offered by AOL and other OSPs. For example, AT&T's Excite@Home affiliate, the largest cable ISP in the United States, provides cable modem services over both AT&T networks and cable networks owned by other cable system operators. In a typical arrangement, Excite@Home is the exclusive provider of Internet service, along with certain proprietary content, to the cable system, whether or not owned by AT&T. Excite@Home operates the servers, routers and other Internet support services and manages the use of the cable network for data delivery services. Subscribers are provided with browsing and e-mail functionalities similar in nature to those offered by other ISPs, allowing the subscriber to send and receive e-mail and to reach content on the World Wide Web.[17]

B. The Commission's Approach To High-Speed Services

11. The Commission has shown regulatory restraint with respect to emerging services in a number of contexts. In the *Computer Inquiries*, for example, the Commission refrained from regulating data processing services, relying in part on the fact that the market for such services, while still nascent, was functioning in a competitive manner.[18] As another recent

[17] *See AT&T/MediaOne Order* at ¶ 107; *AT&T/TCI Order*, 14 FCC Rcd at 3196 ¶ 72.

[18] The Commission explicitly considered data processing services provided via LECs and other traditional telecommunications carriers as early as 1966, when the first *Computer Inquiry* was launched. *See Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No. 16979, Notice of Inquiry, 7 FCC2d 11 (1966) (*Computer I*); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, Final Decision, 77 FCC2d 384 (1980) (*Computer II*); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, CC Docket No. 85-229, Report and Order, 104 FCC2d 958 (1986) (*Computer III*).

example of restraint, the Commission in the *UNE Remand Order* declined to unbundle packet switching and DSLAM functionality used to provide advanced telecommunications services in the incumbent LEC's network, except in limited circumstances.[19]

12. Beginning with our review of the AT&T/TCI merger in 1999, numerous parties have argued that the Commission should require cable operators to provide unaffiliated ISPs with access to cable networks on nondiscriminatory terms and conditions.[20] In the *AT&T/TCI Order*, the Commission declined to condition the transfer on an open access requirement based on the Applicants' representation that subscribers could continue to bypass Excite@Home's proprietary content and reach any content available on the World Wide Web.[21] In its review of the AT&T/MediaOne merger, the Commission again declined to impose an open access condition, based on three primary considerations: (1) the increasingly rapid deployment of alternative high-speed Internet platforms, especially xDSL; (2) a commitment by AT&T/MediaOne to negotiate non-exclusive contracts with unaffiliated ISPs when the Applicants' exclusive arrangements with affiliated ISPs (Excite@Home for AT&T, Road Runner for MediaOne) expire in 2002 and 2001, respectively; and (3) a consent decree between the Department of Justice and AT&T/MediaOne requiring the merged firm to divest its ownership in Road Runner no later than December 31, 2001.[22] Certain parties have petitioned

[19] *See UNE Remand Order* at ¶ 306; 47 C.F.R. § 51.319(c)(3).

[20] *See AT&T/TCI Order*, 14 FCC Rcd at 3197-98 ¶ 75; *AT&T/MediaOne Order* at ¶¶ 114-15.

[21] *AT&T/TCI Order*, 14 FCC Rcd at 3207 ¶ 96.

[22] *AT&T/MediaOne Order* at ¶¶ 116-23. *See also* Applications of America Online, Inc. and Time Warner Inc. for Transfers of Control, CS Docket No. 00-30 (filed February 11, 2000; amended March 21, 2000).

the Commission to reconsider its decision regarding open access in the *AT&T/MediaOne Order*, and the Commission has not yet acted on this petition.[23] This Commission has also considered the question of open access to a cable company's cable modem platform in the context of its Section 706 Reports to Congress. We saw no reason at the time of the *First 706 Report* to require open access to cable modem platforms but stated that "[w]e will, however, continue to monitor broadband deployment closely to see whether there are developments that could affect our goal of encouraging deployment of broadband capabilities pursuant to the requirements of section 706." [24]

13. While the Commission has pursued open access through regulatory restraint, some local governments have sought to achieve open access through regulation. These local efforts have resulted in recent federal court cases that have considered the regulatory status of cable modem service under the Act. In the context of license transfers involving AT&T's cable systems, a number of local franchising authorities (LFAs) enacted ordinances conditioning the license transfer on nondiscriminatory access to the cable

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We note that the Commission rejected a request from an ISP, Internet Ventures, Inc., asking the Commission to rule that the ISP had a right under section 612 of the Act to "leased access" to cable facilities. *See Internet Ventures, Inc., Internet On-Ramp, Inc., Petition for Declaratory Ruling that Internet Service Providers are Entitled to Leased Access to Cable Facilities Under Section 612 of the Communications Act*, File No. CSR-5407-L, Memorandum Opinion and Order (rel. Feb. 18, 2000).

[23] *See In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 99-251, Petition for Reconsideration of Consumers Union, Consumer Federation of America and Media Access Project (filed July 5, 2000).

[24] *First 706 Report*, 14 FCC Rcd at 2449 ¶ 101.

modem platform for unaffiliated ISPs.[25] In *AT&T Corp. v. City of Portland*, the United States Court of Appeals for the Ninth Circuit confirmed this Commission's role in establishing a national broadband policy. The Ninth Circuit also ruled that insofar as Excite@Home provides subscribers with Internet transmission over AT&T's cable network, it was providing a "telecommunications service," and insofar as Excite@Home offers subscribers services traditionally offered by ISPs, the court held that it provides an "information service." [26] The court declined to say whether the Commission should subject the "telecommunications service" provider to the full range of telecommunications common carrier regulations under Title II, observing that the Commission has broad authority to forbear from enforcing those regulations.[27] Reaching a contrary conclusion, the United States District Court for the Eastern District of Virginia has ruled that Excite@Home's cable modem service fits the statutory definition of a "cable service." [28] Finally, the United States Court of Appeals for the Eleventh Circuit has held that "Internet service does not meet the definition of either a cable service or a telecommunications service." [29]

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[25] By "unaffiliated ISP," we mean an ISP in which the cable operator does not have an ownership or controlling interest, and which is not the exclusive provider of Internet services for the subscribers of that cable operator.

[26] *City of Portland*, 216 F.3d at 878. We note that the court reached this conclusion without specifically construing the language of the statutory definitions at issue.

[27] *City of Portland*, 216 F.3d at 879 (citing 47 U.S.C. § 160(a)).

[28] *Henrico*, 97 F.Supp.2d at 715.

[29] *Gulf Power*, 208 F.3d at 1278. *Gulf Power* did not deal with an open access ordinance, but with the question of the rates utility companies may charge for the use of their poles and ducts under 47 U.S.C. § 224.

III. DISCUSSION

14. In ascertaining the appropriate legal and policy environment for cable modem service and the cable modem platform, we seek to develop a factual record regarding the services provided by cable operators and the type of access sought by unaffiliated ISPs. We also seek input on the extent to which such access is necessary to benefit consumers or otherwise achieve policy goals that Congress or the Commission may identify, such as the goals of promoting competition, deregulation, innovation, and the deployment of high-speed services. Specifically, we seek comment on several approaches to classifying cable modem service and/or the cable modem platform and the implications of classifying the service and/or platform under each category. Next, we seek comment on various issues related to open access, including definitional issues and how market-based and regulatory approaches potentially affect the availability of high-speed services. Finally, we seek comment on whether the Commission should pursue any further course of action, such as exercising its rulemaking or forbearance authority.

A. The Classification of Cable Modem Service And/Or The Cable Modem Platform

15. We seek comment on the variety of legal or policy frameworks that might apply to cable modem service and the cable modem platform. Indeed, there may be a number of regulatory approaches possible, from treating cable modem service and/or the cable modem platform as a cable service subject to Title VI; as a telecommunications service under Title II; as an information service subject to Title I; or some entirely different or hybrid service subject to multiple provisions of the Act. We also seek comment on the implications, if any, of adopting a particular framework for classifying cable modem service and/or the cable modem platform as it relates to our regulation of other high-speed

service providers, including those that use xDSL, wireless, satellite, broadcast and unlicensed spectrum technologies.

16. More specifically, with respect to applying Title VI, we invite comment on whether cable modem service and/or the cable modem platform is a cable service. "Cable service" is defined under the Act as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection *or use* of such video programming or other programming service."[30] The terms "or use" were added to the definition in the 1996 Act.[31] Does the legislative history indicate that Congress intended by this change to include cable modem service and/or the cable modem platform in the definition of "cable service"? Specifically, we seek comment on whether the addition of the words "or use" expanded the category of services such that cable modem service and/or the cable modem platform fits within the definition. Notwithstanding the 1996 amendment, a service that is not "video programming" cannot be a "cable

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[30] 47 U.S.C. § 522(6) (emphasis added).

[31] The 1984 Cable Act defined "cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service." Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984 Cable Act). We note that, in amending the definition of cable service in 1996, Congress stated that it did not intend to eliminate the longstanding regulatory distinction between telecommunications service and cable service. *See* Conference Report at 169 ("This amendment is not intended to affect Federal or State regulation of telecommunications service offered through cable facilities, or to cause dial-up access to information services over telephone lines to be classified as a cable service.").

service" unless it qualifies as "other programming service."[32] Does cable modem service and/or the cable modem platform constitute "other programming service" as defined in the Act?

17. We also invite comment on the implications of classifying cable modem service and/or the cable modem platform as a cable service. Would classification as a cable service affect the Commission's ability to establish a uniform national policy with respect to high-speed services? For example, section 622 of the Act gives localities the authority to charge a franchise fee of no more than five percent of the cable operator's gross revenues.[33] How would this requirement apply were the Commission to consider cable modem service and/or the cable modem platform a "cable service"? Similarly, local franchising authorities have the power to establish requirements for facilities and equipment, and to establish and enforce customer service requirements. Cable operators also are subject to various requirements relating to subscriber privacy. We ask for comment on how these and any other pertinent regulatory provisions might apply if cable modem service and/or the cable modem platform were considered a "cable service."

18. In addition, we seek comment on whether cable modem service and/or the cable modem platform is a telecommunications service subject to Title II.[34] Under the Act,

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[32] The definition of "other programming service" requires that it be "information that a cable operator makes available to all subscribers generally." 47 U.S.C. § 522(14).

[33] *See* 47 U.S.C. § 542.

[34] The Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). As described above, the Ninth Circuit classified transmission over a cable modem platform as a telecommunications service. *City of Portland*, 216 F.3d at 878.

"telecommunications"[35] is a necessary component of a "telecommunications service." Is there a component of cable modem service or the cable modem platform that represents pure transmission capability between a subscriber and a destination which does not alter the form or content of the information sent?[36] If so, should we, if only for definitional purposes, sever a telecommunications component from other functions that may be provided? Is it possible for cable subscribers to specify the ultimate points of communication on the Internet? Does it matter, for purposes of determining whether the service is a common carrier offering, that the cable subscriber cannot select ISPs that have not entered into agreements with the cable operator? If cable modem service or the cable modem platform contains a telecommunications component, must the facility used to provide the telecommunications necessarily be classified as a "telecommunications facility"?[37]

19. The Act defines "telecommunications" differently from "telecommunications service." Assuming that cable modem service or the cable modem platform contains a "telecommunications" component, does it follow that the cable operator is providing a "telecommunications service?" That is, is the cable operator offering telecommunications for a fee directly to the public, or to such classes of users as to be

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[35] The Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

[36] *See City of Portland*, 216 F.3d at 877 (noting that the "telephone service linking the user and the ISP is classic 'telecommunications'").

[37] *Henrico*, Amicus Curiae Brief of the Federal Communications Commission at 13, 18-24 (noting that an open access regime would compel the provision of "telecommunications facilities" (*i.e.*, transmission pipelines) to ISPs).

effectively available directly to the public? To the extent that the cable operator is providing a telecommunications service, does this make it a "telecommunications carrier" or a "common carrier," or both? [38] Specifically, if a cable operator provides telecommunications services, does that mean that it is also providing common carrier services? [39]

20. We note that the Act imposes a wide variety of obligations on telecommunications carriers, including requirements relating to interconnection, universal service contributions, disabilities access, and privacy of subscriber

[38] Under the Act, a telecommunications carrier "shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services . . ." 47 U.S.C. § 153(44). The Act defines a "common carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy," other than a person engaged in radio broadcasting. 47 U.S.C. § 153(10). *See also* 47 C.F.R. § 21.2 (defining "communication common carrier" as "[a]ny person engaged in rendering communication service for hire to the public.").

[39] We note that the Commission has previously concluded that, because a particular submarine cable would not be classified as a common carrier cable under the test set forth in *National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) (*NARUC I*), the submarine cable licensee also would not be providing a telecommunications service for a fee to such class of users as to be "effectively available directly to the public" and thus would not be a "telecommunications carrier" under the 1996 Act. In determining that the *NARUC I* test has continued applicability after the 1996 Act, the Commission concluded that "the term 'telecommunications carrier' means essentially the same as common carrier" and "does not . . . introduce a new concept whereby we must look to the customers' customers to determine the status of a carrier." *See AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585, 21587-88 ¶ 6 (1998), *aff'd, Virgin Islands Tel. Co. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999); *Cable and Wireless, PLC*, 12 FCC Rcd 8516, 8522 ¶ 13 (1997).

information. [40] How would those statutory provisions, and the Commission's implementing regulations, apply to cable operators? For example, how would the section 251(a) interconnection obligation apply to cable operators? [41] How would the Commission determine whether cable modem service was provided at rates that are just, reasonable and not unreasonably discriminatory? How would the Commission determine whether the manner in which cable companies allow unaffiliated ISPs to "interconnect" with the cable modem platform is just, reasonable and not unreasonably discriminatory? If the Commission were to adopt a Title II approach, what would be the implications of such an approach under sections 201, 202, and 203 of the Act? That is, as a legal and policy matter, should the *Computer II* unbundling requirements be interpreted to apply to facilities-based carriers including non-dominant carriers? To what extent did imposition of unbundling requirements in that proceeding rely on the presence of market power? Would applying these requirements to cable operators and other facilities-based providers of high-speed services be consistent with the goals of the *Computer Inquiry* proceedings? Parties advocating such an approach should discuss the boundaries of

[40] *See, e.g.*, 47 U.S.C. § 251(a) (direct or indirect interconnection); 47 U.S.C. § 254(d) (contributions to the universal service fund); 47 U.S.C. § 255 (telecommunications services for hearing-impaired and speech-impaired individuals); 47 U.S.C. § 222 (privacy). *See also* 47 U.S.C. § 1001 *et seq.* (Communications Assistance for Law Enforcement Act). We note that telecommunications carriers also are subject to requirements derived from state law, which may include certification, tariffing, reporting requirements, and the payment of regulatory fees.

[41] These and other questions relating to access to the cable modem platform incorporate issues contained in the US Internet Industry's Petition for Declaratory Ruling and Institution of Rulemaking with Respect to Tariffs for Cable Internet Interconnectivity (filed July 7, 2000).

federal, state, and local authority over access to the cable modem platform.

21. In answering the foregoing, parties should discuss whether cable operators should be treated as common carriers, which provide service indiscriminately to all potential customers, or as private carriers, which make individualized decisions whether and on what terms to provide service.[42] How should Commission precedent and other relevant caselaw, including *NARUC I*, inform the Commission's inquiry into the nature of cable modem service and the cable modem platform?

22. We also seek comment on whether the cable modem platform is an advanced telecommunications capability.[43]

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[42] We note that the Commission traditionally has applied the two-part test of *NARUC I* to distinguish between common carriage and private carriage, inquiring first whether the carrier is under any legal compulsion to serve the public indifferently, and second whether there are reasons implicit in the nature of the carrier's operations to expect that it will hold itself out to the eligible user public indifferently. Regarding the second prong, the Commission has determined that the eligible user public is not limited to end users but may include services offered to other carriers. *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 ¶ 785 (1987); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 22032-33 ¶¶ 263-65 (1996) (*Non-Accounting Safeguards Order*).

[43] The Commission has interpreted advanced telecommunications capability under section 706 of the Act as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics and video telecommunications using any technology" which offers 200 kbps of bandwidth to and from a subscriber. *Second 706 Report* at ¶¶ 10-11. In issuing its *Second 706 Report*, the Commission considered the deployment of cable modem services. *Second 706 Report* at ¶ 29.

Are there any differences between advanced telecommunications capabilities, telecommunications facilities, and telecommunications services? Does defining cable modem service or the cable modem platform as an advanced telecommunications capability capture all of the uses of cable modem service or only the use of a cable modem service to provide Internet services? To the extent that cable modem service and/or the cable modem platform constitutes an advanced telecommunication capability pursuant to section 706 of the Act, how does that classification affect the Commission's authority to forbear from regulation under section 10 of the Act?

23. We also invite comment on another question, that is whether cable modem service and/or the cable modem platform constitutes an information service.[44] We note that the Commission has classified the end user services commonly provided by dial-up ISPs as information services.[45] Does cable modem service and/or the cable modem platform fit within this definition? We seek comment on the implications, if any, of classifying cable modem service and/or the cable modem platform as an information service under the Act. Information service providers as such are not subject to regulation under Title II as common carriers; the

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[44] The Act defines an "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20).

[45] *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Order on Remand, 15 FCC Rcd 385, 401 ¶ 34 (1999); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11536 ¶ 73 (1998) (*Universal Service Report*).

fact that information service is provided "via telecommunications" does not alter that conclusion.[46] With respect to cable modem service, if a cable operator simultaneously offers a telecommunications and information service, should we, if only for definitional purposes, sever the underlying telecommunications, or the telecommunications service, from the information service offering? [47] Is there any reason to treat the cable modem service as if it were solely an information service? Should the Commission's treatment differ depending on whether the provider of cable modem service also owns or controls the underlying transmission platform?

24. Finally, we invite comment on whether cable modem service and/or the cable modem platform is distinct from the regulatory classifications identified above and would require a new legal and policy framework. To the extent the Commission deems it appropriate, under what authority (apart from the authority cited above) could it require cable

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[46] *See Universal Service Report*, 13 FCC Rcd at 11508, 11511, 11516, 11520, ¶¶ 13, 21, 33, 39. Following passage of the 1996 Act, the Commission determined that Congress intended the categories of "telecommunications service" and "information service" under the Act to be mutually exclusive, and to parallel the definitions of "basic service" and "enhanced service" developed in the Commission's *Computer II* proceeding, as well as the Modification of Final Judgment. In *Computer II*, the Commission found that enhanced service providers were not "common carriers" under the Act and therefore were not subject to regulation under Title II of the Act. *Computer II*, 77 FCC2d at 430-34, ¶¶ 120-29.

[47] We note that a company that provides both telecommunications and information services is classified as a telecommunications carrier to the extent that it is acting as a telecommunications carrier. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15990, ¶ 995 (1996) (*Local Competition Report*).

operators to be subject to the unbundling requirements that stem from the Commission's *Computer Inquiries* or impose similar unbundling requirements? [48] For example, could the Commission use its Title I authority to achieve open access to the cable modem platform for ISPs?

B. Issues Surrounding Open Access

25. We turn now to the issue of open access. We first examine definitional issues. We then invite comment on whether open access is a desirable policy goal. If it is, we ask commenters to explore whether a market-based approach will adequately achieve that objective, or whether the Commission should adopt a regulatory, or prescriptive, approach. If commenters advocate a regulatory approach, we seek comment on the jurisdictional basis for the Commission's taking regulatory action. We inquire whether the same approach should apply to other providers of high-speed services, and what jurisdictional basis would support application of this approach. We also invite comment on the

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[48] We note that the unbundling requirements in the 1996 Act are distinct from the unbundling requirements adopted in *Computer II*. "Unbundling" as used in *Computer II* means that all facilities-based common carriers providing enhanced services in conjunction with basic services must file tariffs for the underlying basic service and acquire the service in the same manner as resellers. In the *Computer II* proceeding, which preceded the 1996 Act, the Commission classified all services offered over a telecommunications network as either basic or enhanced. A basic service consists of the offering of "transmission capability for the movement of information," whereas an enhanced service comprises any offering over the telecommunications network which is more than a basic transmission service. *Computer II*, 77 FCC 2d at 419-20 ¶¶ 93, 96-97. *See also* 47 C.F.R. § 64.702(a) (defining enhanced service). The Commission has determined that "information services" under the 1996 Act include all services that were considered "enhanced services" prior to the 1996 Act. *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21955-56 ¶ 102.

technical and operational concerns with achieving open access.

1. What Is "Open Access"?

26. How should the Commission define "open access" to cable networks? We seek comment on whether the Commission should consider, in determining the appropriate level of access, policy goals that Congress or the Commission may identify, such as the goals of promoting competition, deregulation, innovation, and the deployment of high-speed services. As discussed below, we ask commenters to recommend specific goals that can and should be accomplished by open access.

27. Currently, there is no universally accepted definition of "open access." Most open access proposals entail two broad requirements, providing unaffiliated ISPs with the right to: (i) purchase transmission capability; and (ii) access the customer directly from the incumbent cable operator. Apart from those general requirements, however, there are numerous different technological and economic models for what open access might mean, and technological approaches for how it might be implemented.[49] Should we define open access based on the manner or degree of access we ultimately determine is necessary to achieve particular goals?

28. Industry participants have different conceptions of open access. For example, OpenNet Coalition, a group of ISP and LEC interests, defines open access as "the ability of consumers to choose the Internet service provider of their choice . . . Enabling consumers and their chosen Internet service providers to reach each other requires that Internet service providers not chosen by the cable company have the ability to purchase, on a nondiscriminatory basis, the use of

[49] *See infra* Section III.B.5.

'last mile' communications facilities to reach consumers who are requesting their service."[50] AOL and Time Warner present an alternative conception of open access in their Memorandum of Understanding of February 29, 2000. Under their conception, open access is achieved through negotiated commercial agreements between cable operators and ISPs operating in a free market. The prices, terms and conditions for such agreements may differ depending on the ISP's needs and the cable operator's resources, but will not vary based on affiliation or lack thereof.[51]

29. In the current environment some cable operators have entered into exclusive arrangements with one particular ISP (*e.g.*, AT&T's arrangement with Excite@Home), and all cable Internet subscribers must pay the cable operator for the Internet service of that particular ISP even if they choose to use an alternative OSP.[52] Although we recognize that these cable operators have recently negotiated access to their networks by certain unaffiliated ISPs, nevertheless, these cable operators currently are not legally prohibited from having an exclusive relationship with one particular ISP.[53] Should the Commission consider the approach of achieving

[50] OpenNet Coalition White Paper: "Frequently Asked Questions about AT&T's Acquisition of MediaOne, Open Access, and the Public Interest," at 23 (Sept. 17, 1999).

[51] Memorandum of Understanding Between Time Warner, Inc. and America Online, Inc. Regarding Open Access Business Practices (Feb. 29, 2000) (*AOL-Time Warner MOU*).

[52] Because only one ISP (chosen by the cable operator) is providing connectivity to the Internet, the subscriber who uses an alternative OSP is in fact paying the alternative OSP for its content, rather than for a connection to the Internet.

[53] As discussed below, to the extent that cable modem customers have grown accustomed to choosing their ISPs in the narrowband context, cable companies may perceive and choose to satisfy a market demand for such choice in the high-speed context.

openness through negotiated commercial agreements between cable operators and unaffiliated ISPs an open access model? Does this model provide an appropriate level of openness?

30. Based on this background, we ask for comment, in particular, on three possible models. Under one open access model, no particular connecting ISP has a privileged or preferred relationship with the cable operator; rather, each ISP purchases transmission capability and customer access from the cable operator on nondiscriminatory prices, terms and conditions, and the cable operator manages the network on a nondiscriminatory basis. Under a second open access model, multiple ISPs purchase transmission capability and customer access from the cable operator on nondiscriminatory prices, terms, and conditions, but an affiliated or preferred ISP manages the network on a nondiscriminatory basis. Under a third model, multiple unaffiliated ISPs would obtain access to the cable modem platform according to agreements negotiated between those ISPs and cable operators. We invite comment on whether open access should be conceptualized according to any of these proposed models, or according to some other model. Under the first two models, should cable operators be required to provide unaffiliated ISPs "nondiscriminatory" access, a standard borrowed from common carrier regulation, or some other standard? We also seek comment on how a decision to pick any of these open access models for cable-based networks would affect other providers of high-speed services. We recognize that an open access environment may develop using each, or a combination, of these models. In addition, we ask whether, under the second model, the affiliated or preferred ISP will have a competitive advantage over other ISPs. We also seek comment on the impact, if any, of adopting a particular model of open access on other high-speed service providers, including those using wireless, satellite, broadcast, and unlicensed spectrum technologies.

31. With respect to any of the models discussed herein, including those that allow one ISP to manage the network, we invite comment on the extent to which affiliated and unaffiliated ISPs would be capable of accessing network operations and management capabilities. In particular, we seek comment on the extent of ISP access to or control over operations support systems used in managing the network or the set top box or cable modem itself, including maintenance and repair, customer care and other operations functions. Commenters should also address whether their model includes identical operations support systems interfaces for affiliated and unaffiliated ISPs. We also seek comment on whether the entity that controls the design and deployment of the set top box or cable modem has an advantage in terms of access, applications, or content. Specifically, what obstacles, if any, would the functions embedded in the set top box or cable modem present to unaffiliated ISPs that seek to deploy innovative services? For example, would access to the software or firmware embedded in the set top box or cable modem increase an ISP's cost in such as a way as to affect the ISP's incentive to deploy new services? We particularly invite manufacturers of set top boxes and cable modems to address these and other questions related to the capabilities embedded in their products.

2. Is Open Access A Desirable Policy Goal?

32. We invite comment on the policy considerations that should underlie our analysis of open access issues. Specifically, we invite comment on the desirability of open access as a policy goal. Should the Commission encourage open access to the cable modem platform? If so, what are the appropriate underlying goals that the Commission should seek to achieve through such openness, and what degree of openness is necessary to achieve those goals? Is open access necessary, for example, to benefit consumers or otherwise achieve policy objectives identified by Congress or the

Commission, such as promoting competition, deregulation, innovation, and investment in and deployment of high-speed services? What are the best means for the Commission to facilitate the deployment of high-speed services in a manner that benefits consumers? We also ask what costs may be associated with open access and how those costs compare to the benefits of open access.

33. More specifically, commenters should address the services that ISPs currently provide and what new services will likely be offered by ISPs as the Internet enters the high-speed era. Which of these new services, if any, will require ISPs to obtain nondiscriminatory access to the cable modem platform as opposed to other levels or types of access? To the extent nondiscriminatory access is required, why is it required? What are the potential harms of failure to achieve open access? In what specific ways is competition among ISPs important to ensure the widespread availability of high-speed, high-quality services at competitive rates? What benefits does a competitive ISP market bring to other areas of the Internet, such as innovation among content and application providers? How would competition between ISPs affect consumer choice and value, including access by persons with disabilities?

3. If Open Access Is A Desirable Policy Goal, What Are The Most Appropriate Means Of Achieving That Objective?

34. If open access is a desirable policy goal, we invite comment on whether a market-based approach will adequately achieve that objective, or whether the Commission should adopt another approach. Commenters should discuss the implications of our determination of the framework for cable modem services and access to the cable modem platform for providers of similar services using other technologies, such as xDSL, satellite, broadcast, or wireless technologies.

a. Should The Commission Continue A Market-Based Approach?

35. We invite comment on whether market-based approaches are sufficient to achieve the level of access by ISPs to the cable modem platform that the Commission determines is appropriate. Considering the current conditions in the market for cable high-speed services, is there a need for mandated open access or will market forces operate to achieve open access? Specifically, how will mandated open access impact unaffiliated ISPs and OSPs, unaffiliated content providers, and end users? The decision to provide open access voluntarily may depend on the degree of competition in the provision of local facilities. Are the harms from failure to achieve open access impacted by the presence of competing local facilities? Are any of these harms likely to take place without government intervention? If so, why? To what extent is such regulatory intervention necessary, and what costs would be associated with that intervention? What should be the Commission's role, if any, in promoting and encouraging competition among ISPs?

36. We seek to understand the economic incentives of cable operators, both outside of and under alternative open access models. For example, do cable operators have any incentive to cooperate with multiple ISPs that seek access to their platforms? Do cable operators have an incentive to allow non-exclusive access in order to increase the number of end users purchasing cable modem services? Do cable operators that are vertically integrated with an ISP or OSP have less incentive to provide open access in order to decrease competition for the integrated ISP or OSP? How do cable operators weigh these competing incentives, and what might induce a vertically integrated cable operator to provide open access? We also seek to determine how, in a market-based approach, multiple ISPs will be provided access, and how and by whom these ISPs will be chosen. Is the number

of ISPs under a market-based approach likely to be sufficient to achieve the goals of open access? Why or why not? A vertically integrated cable operator may choose to provide access to ISPs or OSPs that do not compete with the cable operator's ISP or OSP, in order to increase the number of end users purchasing cable modem services. Are there significant differences in ISPs? In OSPs? How different, if at all, are those incentives from the incentives of non-vertically integrated cable operators to offer end users a diverse set of ISPs and OSPs? What incentives do these operators have *not* to frustrate end users' access to unaffiliated content? What specific evidence is there that operators have denied their cable modem customers access to unaffiliated content to date? Will the incentives to provide open access change as competition increases in the provision of high-speed access services by DSL providers and providers of other high-speed services? What role, if any, do consumer expectations regarding the availability of multiple, unaffiliated ISPs in the traditional narrowband wireline context have on cable operators' incentives to provide similar availability over cable modem platforms?

37. We also seek comment on the reported development of market-based access initiatives. Initially, cable operators signed exclusive agreements with one ISP (most notably Excite@Home and RoadRunner). Currently, however, there appears to be some movement toward allowing access to additional ISPs. For example, AT&T released a letter, co-signed with Mindspring Enterprises, Inc., promising to allow Mindspring and other ISPs access to its cable platform once its exclusivity agreement with Excite@Home expires in 2002.[54] Similarly, Time Warner, Inc. and AOL released a

[54] Letter from David N. Baker, Vice President, Mindspring Enterprise, Inc., James W. Cicconi, General Counsel and Executive Vice President, AT&T Corp., and Kenneth S. Fellman, Chairman, FCC Local & State Government Advisory Committee to William E. Kennard, Chairman, FCC, CS Docket No. 99-251 (filed Dec. 6, 1999).

Memorandum of Understanding promising ISPs open access to Time Warner's cable platform once its exclusivity agreement with RoadRunner expires in 2001.[55] There are further indications that cable operators are moving toward allowing other ISPs access to their platform. Time Warner, for example, recently announced that it had reached an agreement with Juno Online Services, Inc., whereby Juno will become the first unaffiliated ISP to use Time Warner cable systems for the provision of high-speed Internet services.[56]

38. We seek information on the development and importance of this trend. First, we seek information on the extent to which cable operators are already providing access to unaffiliated ISPs.[57] Are new entrants more or less likely than incumbents to provide access to unaffiliated ISPs? Parties should discuss any ongoing trials testing the technical aspects of allowing access to multiple ISPs. We also invite parties to assess the viability of the methods used to provide multiple access in those trials. We are particularly interested in the scalability of the configuration of these trials. We are also interested in the ability of ISPs to offer network capability, including multicasting, caching, and different classes of services, as well as services such as streaming

[55] *AOL-Time Warner MOU*.

[56] *See* Time Warner, Inc., *Juno and Time Warner Reach Agreement to Offer Juno Express Over Time Warner Cable Systems* (July 31, 2000) (press release), http://cgi.timewarner.com/cgi-bin/corp/news/index.cgi?template=article&article_id=200294 (viewed Aug. 24, 2000).

[57] For instance, reports indicate that small cable operators are partnering with local ISPs in order to share cable plant upgrade costs in exchange for ISP access to the cable system. *See* Comments of American Cable Association (filed April 24, 2000) on Time Warner and America Online Applications for Transfers of Control and Associated Public Interest Statement, CS Docket No. 00-30.

media and voice, absent regulatory intervention. To what extent are these current practices and trends sufficient to provide the degree and manner of access by unaffiliated ISPs that is necessary to promote deployment of high-speed services, competition, deregulation, and other goals contemplated by the Act?

39. We are further interested in assessments of the current pledges by cable operators for future open access. Are these pledges specific enough to guarantee open access once they are implemented? To what extent is such eventual implementation necessary to promote deployment of high-speed services, competition, deregulation, and other goals contemplated by the Act? If such pledges are lacking in necessary specificity, what additional details or commitments would increase the likelihood that they will eventually be implemented without government intervention? Can such additional details and commitments be fleshed out without favoring certain unaffiliated ISPs or business plans over others?

40. We recognize that a number of business models for open access may develop. For example, in one business model, a cable operator would maintain the billing relationship with the customer and compensate the ISP. Under another business model, an ISP would maintain the billing relationship with the customer and compensate the cable operator. Alternatively, a cable operator and an ISP could independently bill the customer. How do these or other potential business models affect the incentives for achieving open access?

b. Should The Commission Act To Ensure Open Access?

41. We now turn to the question of whether the Commission should take action to achieve open access. We stress that, before we will take any regulatory action on this issue,

we must first determine that open access is desirable as a policy matter and that market forces are insufficient to achieve this objective. We begin by seeking comment on the Commission's authority to require open access. Does the Commission have explicit authority to require open access under Title II or Title VI? If not, can the Commission exercise its ancillary authority under Title I as it pertains to our express authority under Title II or Title VI? [58]

42. Assuming the Commission has the jurisdiction to require open access, and assuming that open access is desirable as a policy matter, we seek to determine the conditions under which the Commission should mandate open access to the cable modem platform. Specifically, should the Commission intervene if a cable operator is the only facilities-based provider of high-speed services and it owns or controls the ISP providing service to end users? Should the Commission intervene if there is an actual or potential competitor to the cable operator? Commenters should describe any public interest harms that would otherwise result from closed access or requiring open access to the cable modem platform. Commenters should address whether and the extent to which such harms will be realized if ISPs seeking access to the cable modem platform offer services that are not different from or more attractive to consumers than those provided by the affiliated ISP. Commenters should also describe how requiring open access would alleviate the harms associated with closed access, and discuss any costs that may result from requiring open access. In addition, commenters should address how imposing regulations in this area would comport with the Commission's historical policy of not regulating the Internet. Commenters should compare specifically the advantages and

[58] *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-78 (1968).

disadvantages associated with regulatory intervention designed to prevent future, potential bottlenecks or impediments to competition and intervention designed to address such impediments that have clearly manifested themselves.

4. Should A Uniform Framework Apply To All Providers Of High-Speed Services?

43. High-speed services are provided using a variety of public and private networks that rely on different network architectures and transmission paths including wireline, wireless, satellite, broadcast, and unlicensed spectrum technologies.[59] Wireline incumbent and competitive LECs currently provide high-speed services in conjunction with affiliated or unaffiliated ISPs and operate pursuant to Title II of the Act. For example, pursuant to the requirements of the Commission's *Computer Inquiries*, certain common carriers must allow ISPs to purchase basic transmission services on a nondiscriminatory basis.[60] As a result, end users are typically

[59] Depending upon the network, data may travel from the sender to the recipient over various architectures and transmission paths such as copper wire, cable, terrestrial wireless radio spectrum, satellite radio spectrum, or a combination of these and other media. In addition, data may be transmitted using different communications protocols that manage and direct traffic at different layers of a particular network.

[60] Originally, the Commission in *Computer I* required all carriers to provide enhanced services through structurally separate subsidiaries. In *Computer II*, while maintaining that "the importance of the control of local facilities cannot be overstated" in its risk of creating an access bottleneck, the Commission conducted a cost benefit analysis and concluded that rules such as requiring facilities-based carriers to unbundle transport from enhanced service were sufficient to protect the enhanced service market. Thus, requiring structural separation for smaller carriers would not be necessary. The Commission concluded that AT&T and GTE had greater incentive and resources to discriminate in favor of their affiliated enhanced service providers (ESPs) and could efficiently create separate

given a choice of ISPs, which could be accessed over the telephone network. Cable operators have traditionally provided service pursuant to Title VI of the Act and do not currently operate pursuant to rules requiring end user ISP choice. Wireless and satellite providers, while subject to the Commission's licensing rules and authority to allocate and manage spectrum under Title III, are not currently required to provide network access to multiple ISPs.[61] Likewise, entities providing Internet service pursuant to Part 15 of the Commission's rules are under no obligation to allow multiple ISPs to access their networks.[62]

44. We seek comment on whether uniform requirements for high-speed services provided using different platforms would facilitate the deployment of all such services, and whether we could implement uniform requirements consistent with our statutory mandate. If we determine that a regulatory approach is warranted, could the legal framework we establish apply to incumbent and competitive LECs, as well as cable operators? Could the legal framework apply to other providers of high-speed services including those that employ wireless, satellite, broadcast, and unlicensed spectrum technologies? If so why? If not, why not? In deciding whether the legal framework should apply to a particular high-speed provider, should it matter whether the provider has market power or is vertically integrated?[63] Should it

subsidiaries and therefore required them to operate their affiliated ESPs through structurally separate subsidiaries. *Computer II* at ¶¶ 18, 215-31.

[61] *See* 47 U.S.C. § 332 *et seq.* (wireless providers); 47 U.S.C. § 151 *et seq.* (satellite providers).

[62] *See* 47 C.F.R. § 15.1 *et seq.*

[63] By "vertically integrated" we mean a provider that owns both underlying transmission facilities and owns or controls an affiliated ISP that provides Internet services to end users over these underlying transmission facilities.

matter that some providers operate under common carrier requirements to serve the public indifferently? Should it matter that some providers must set aside a portion of capacity for purposes other than high-speed services? Should it matter whether the provider is subject to competition from other providers of high-speed services in the geographic area in which it operates?

45. In determining whether to impose the same regulations on different types of providers of high-speed services, what impact, if any, should we give to the fact that the Act itself imposes different obligations on different service providers and technologies, despite Congress' expectation that providers would begin to compete in new markets (*i.e.*, cable companies entering the local telephone market)? To the extent the Commission attempts to achieve goals such as competitive neutrality, how should the Commission define these goals? For example, should the Commission attempt to achieve competitive neutrality by imposing the same particular requirements on competing providers of a given service, or should the Commission ensure only that the *overall* regulatory burdens imposed on such competitors are roughly equal? Should the notion of competitive neutrality compensate for market or economic advantages that incumbent providers may have over newer entrants, particularly entrants that are beginning to compete in non-traditional markets (*e.g.*, cable companies carrying data processing services)? We also ask for comment on how we should decide which framework should apply when a given service could conceivably be regulated under more than one regulatory framework, as might be the case, for example, for Internet telephony. What criteria should guide the Commission's decision on this issue? In particular, if the Commission may legitimately choose between regulatory approaches, we ask commenters to address reasons for adopting one approach over another and how we should

consider public interest obligations arising under one approach and not another.

46. In conducting this analysis, should technological differences affect our analysis of which regulatory regime, if any, should apply? Are there any differences or similarities in the inputs used to provide high-speed services over wireline, wireless, satellite, broadcast, and unlicensed spectrum platforms? If so, what are these similarities or differences?

5. What Are The Technical And Operational Issues Associated With Open Access?

47. Various concerns have been raised before the Commission concerning the technical and operational issues surrounding open access to the cable modem platform. We seek comment on similar problems concerning other high-speed platforms, including those using wireless, satellite, broadcast, and unlicensed spectrum technologies. At this point, it is well accepted that some form of open access to the cable modem platform is possible. It is apparent, however, that there are remaining technical and operational issues concerning open access to the cable modem platform. We seek comment on these issues.

48. To highlight some of the technical and operational issues, we ask what is the meaning of "interconnection" in this context? At what points in the cable network can ISPs interconnect? Are there technically superior locations for ISP interconnection, either from the ISP's perspective or the cable operator's perspective? Does interconnection at other locations yield competitively significant disadvantages for unaffiliated ISPs? If so, what are these disadvantages? Are there multiple methods for implementing open access to cable networks, and to what extent is each method scalable to allow access by the number of ISPs necessary to achieve the goals underlying open access? Will individual subscribers have access to multiple ISPs simultaneously, or will a subscriber

have to unsubscribe from one ISP before gaining access to a second? Does use of the same cable plant by multiple ISPs create problems of congestion and network management? What type of bandwidth and quality of service arrangements will cable operators make available? Who will be responsible for network management and customer service? Under an open access regime, what control will the cable operator have over the Internet content available to subscribers? Who will control access to the customer? Will ISPs have the option of marketing and billing their service over the cable platform directly to the consumer or, alternatively, the option of contracting with the cable company or third parties for this service? What standard(s) should the Commission apply in determining whether access is sufficiently open (non-discrimination, reasonable opportunity to contract in good faith, etc.)? What steps can be taken to assure that unaffiliated ISPs' access to cable networks satisfies such standards in terms of pricing, service, interconnection, and other relevant factors?

We recognize that cable systems support both Internet service as well as analog and digital television channels. We seek comment on the potential services that may develop that make use of a combination Internet and television broadcast channel platform. For example, will problems arise by allowing the affiliated or preferred ISP the ability to combine Internet services to the television broadcast channel?

C. The Commission's Options

50. Depending on the classification of cable modem service and the cable modem platform, as well as the desired policy goals, the Commission has various options available to it. In this section, we invite parties to comment on particular courses of action, and to propose other possible outcomes. If market incentives continue to work to foster a competitive environment, the Commission may find regulatory intervention to be unnecessary. Alternatively, the Commission

may choose to initiate a rulemaking proceeding or forbear from enforcing statutory and regulatory requirements.

1. Should The Commission Continue Its Current Approach?

If the Commission finds that the classification of cable modem services and/or the cable modem platform does not introduce additional obligations upon cable operators and that market incentives will continue to foster a competitive environment for high-speed services, the Commission may find further action unnecessary. We invite comment on the suitability of this course of action, and whether this course of action ensures adequate deployment and consumer access to high-speed services.

2. Should The Commission Initiate A Rulemaking Proceeding?

52. In light of the regulatory classification and desired policy goals, we ask whether there is a need for the Commission to initiate a rulemaking to consider adopting rules, policies, and regulations governing cable modem service or access to the cable modem platform. We invite suggestions for changes in our existing rules or policies for additional regulations pertaining to cable modem services and other high-speed services, and whether the proposed changes in our rules and policies ensure adequate deployment of and consumer access to high-speed services.

3. Should The Commission Exercise Its Forbearance Authority?

53. If the Commission finds that the marketplace is working and classifies cable modem service and/or the cable modem platform as a telecommunications service, it may choose to forbear from enforcing applicable regulatory requirements. Section 10(a) of the Act grants the Commission authority to forbear from applying any regulation or

provision of the Act to "a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets," if it determines that: (1) enforcement of that regulation or provision is not necessary to ensure just, reasonable and nondiscriminatory charges, practices, classifications or regulations; (2) enforcement of that regulation or provision is not necessary to protect consumers; and (3) forbearance is consistent with the public interest.[64] To the extent the Commission determines that cable modem service and/or the cable modem platform is a telecommunications service, we invite comment on whether the Commission should exercise its forbearance authority, and from what statutory provisions or rules it should forbear. Are there provisions and rules from which forbearance is not appropriate? [65] Parties should address how forbearance from any particular provision or rule would satisfy the necessary statutory criteria. Parties should also discuss for which class of telecommunications carriers or telecommunications services and in which geographic markets the statutory showing would be met.

54. Should the Commission forbear from enforcing section 251(a)'s interconnection requirement in this context? In the event that cable operators are found to be common carriers providing an information service, and therefore subject to the requirements stemming from the *Computer Inquiries*, should the Commission forbear from enforcing the requirement to unbundle basic service from enhanced? What role in its

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[64] 47 U.S.C. § 160(a). Section 10(e) precludes a state from applying or enforcing provisions of federal law where the Commission has decided to forbear. 47 U.S.C. § 160(e).

[65] *See, e.g.*, 47 U.S.C. § 254(d) (universal service contribution); 47 U.S.C. § 201 (service and charges); 47 U.S.C. § 202 (discrimination and preferences).

analysis, if any, should the Commission give to the possibility that forbearance will provoke competitors to enter the market? If cable modem service or the cable modem platform is a local exchange service and defined as telephone exchange or exchange access service, are providers of cable modem service or the cable modem platform local exchange carriers subject to section 251(b) of the Act? Commenters should address whether forbearance would be appropriate if cable modem service and/or the cable modem platform is classified as a local exchange service.

55. We seek to determine the conditions under which the Commission should forbear from imposing or enforcing open access obligations. Specifically, should the Commission forbear if there are potential or actual competing facilities-based providers of high-speed services? Parties should describe how competition in the provision of high-speed services could act to alleviate any harms that may warrant the imposition of open access obligations. Parties should describe the specific conditions that may demonstrate to the Commission that competition is sufficient to forbear from enforcing open access obligations.

56. To the extent that the Commission finds that forbearance from statutory provisions or our rules is appropriate with respect to cable modem service and/or the cable modem platform, should the Commission also forbear from enforcing these provisions or rules as applied to other providers of high-speed services? Should the Commission use its forbearance authority to achieve competitive neutrality with respect to all providers of high-speed services? If so, why? If not, why not? Other than competitive neutrality, are there other goals the Commission should attempt to achieve if it decides to regulate in this area? If so, what are these other goals? Should the Commission emphasize some of these goals more than competitive neutrality or other goals? Commenters should provide a detailed explanation of how the

Commission's section 10 analysis should be applied to various providers of high-speed services.

IV. PROCEDURAL MATTERS

57. Pursuant to sections 1.415, 1.419, and 1.430 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, 1.430, interested parties may file comments within 45 days after publication in the Federal Register, and reply comments within 75 days after publication in the Federal Register. All filings should refer to GN Docket No. 00-185. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[66] Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket number, which in this instance is GN Docket No. 00-185. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address." A sample form and directions will be sent in reply.

58. Parties who choose to file by paper must file an original and four copies of each filing. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, Room TW-B204, 445 12th St. S.W., Washington, D.C. 20554. Regardless of whether parties choose to file electronically or by paper, parties should also serve: (1)

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[66] *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24,121 (1998).

Johanna Mikes, Common Carrier Bureau, 445 12th Street, S.W., Room 5-C163, Washington, D.C. 20554; (2) Christopher Libertelli, Common Carrier Bureau, 445 12th Street, S.W., Room 5-C264, Washington, D.C. 20554; (3) Carl Kandutsch, Cable Services Bureau, 445 12th Street, S.W., Room 3-A832, Washington, D.C. 20554; (4) Douglas Sicker, Office of Engineering and Technology, 445 12th Street, S.W., Room 7-A325, Washington D.C. 20554; (5) Robert Cannon, Office of Plans & Policy, 445 12th Street, S.W., Room 7-B410, Washington, D.C. 20554; and (6) the Commission's copy contractor, International Transcription Service, Inc. (ITS), 445 12th Street, S.W., CY-B402, Washington, D.C. 20554, (202) 857-3800, with copies of any documents filed in this proceeding. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room CY-A257, 445 12th Street, S.W., Washington, D.C. 20554.

59. Parties who choose to file by paper should also submit their comments on diskette. These diskettes should be submitted to Janice Myles, Common Carrier Bureau, 445 12th Street, S.W., Room 5-C327, Washington, D.C. 20554. Such a submission should be on a 3.5 inch diskette formatted in an IBM compatible format using WordPerfect 5.1 for Windows or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the docket number, in this case, GN Docket No. 00-185), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase "Disk Copy—Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file. In addition, commenters must send diskette copies to the Commission's

copy contractor, International Transcription Service, Inc., 1231 20th Street, N.W., Washington, D.C. 20036.

60. Comments and reply comments must include a short and concise summary of the substantive arguments raised in the pleading. Comments and reply comments must also comply with section 1.49 and all other applicable sections of the Commission's rules.[67] We also direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments. All parties are encouraged to utilize a table of contents, regardless of the length of their submission. We also strongly encourage that parties track the organization set forth in this *Notice of Inquiry* to facilitate our internal review process.

61. Pursuant to 47 C.F.R. § 1.200(a), which permits the Commission to adopt modified or more stringent *ex parte* procedures in particular proceedings if the public interest so requires, we announce that this proceeding will be governed by "permit-but-disclose" *ex parte* procedures that are applicable to non-restricted proceedings under 47 C.F.R. § 1.1206. Designating this proceeding as "permit-but-disclose" will provide an opportunity for all interested parties to receive notice of the various technical, legal, and policy issues raised in *ex parte* presentations made to the Commission in the course of this proceeding. This will allow interested parties to file responses or rebuttals to proposals made on the record in this proceeding. Accordingly, we find that it is in the public interest to designate this proceeding as "permit-but-disclose."

62. Parties making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a

[67] *See* 47 C.F.R. § 1.49.

one or two sentence description of the views and arguments presented is generally required. *See* 47 C.F.R. § 1.1206(b)(2), as revised. Other rules pertaining to oral and written presentations are set forth in Section 1.206(b) as well. Interested parties are to file any written *ex parte* presentations in this proceeding with the Commission Secretary, Magalie Roman Salas, 445 12th Street, S.W., TW-B204, Washington, D.C. 20554, and serve with copies: (1) Johanna Mikes, Common Carrier Bureau, 445 12th Street, S.W., Room 5-C163, Washington, D.C. 20554; (2) Christopher Libertelli, Common Carrier Bureau, 445 12th Street, S.W., Room 5-C264, Washington, D.C. 20554; (3) Carl Kandutsch, Cable Services Bureau, 445 12th Street, S.W., Room 3-A832, Washington, D.C. 20554; (4) Douglas Sicker, Office of Engineering and Technology, 445 12th Street, S.W., Room 7-A325, Washington D.C. 20554; (5) Robert Cannon, Office of Plans & Policy, 445 12th Street, S.W., Room 7-B410, Washington, D.C. 20554; and (6) International Transcription Service,. Inc. (ITS), 445 12th Street, S.W., CY-B402, Washington, D.C. 20554, (202) 857-3800.

63. Because many of the matters on which we request comment in this Notice may call on parties to disclose proprietary information such as market research and business or technical plans, we suggest that parties consult 47 C.F.R. § 0.459 about the submission of confidential information.

64. Alternate formats (computer diskette, large print, audio recording, and Braille) are available to persons with disabilities by contacting Brian Millin at (202) 418-7426 voice, (202) 418-7365 TTY, or at bmillin@fcc.gov. This Notice of Inquiry can also be downloaded in MS Word and ASCII formats at www.fcc.gov/cib/dro.

V. ORDERING CLAUSE

65. Accordingly, IT IS ORDERED, that pursuant to authority contained in sections 4, 201-202, 303, 403, and 601

of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 201-202, 303, 403, 521 and section 706 of the Telecommunications Act of 1996, this Notice of Inquiry IS ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

(3)

No. 00-832

Supreme Court, U.S.
FILED
JAN 2 2001
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioner,

v.

GULF POWER COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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ARGUMENT

In our petition, we demonstrated that review by this Court was necessary to resolve the issue – squarely addressed by the court of appeals as part of a consolidated, nationwide appeal – of whether cable systems that provide Internet services over the same lines that they use to provide video programming services thereby forfeit regulatory oversight designed to ensure "just and reasonable" "rates, terms, and conditions" for their access to essential bottleneck facilities owned or controlled by utilities. Pet. 3, 13-26. We showed that the court of appeals' ruling misconstrues congressional intent as expressed in the plain language of 47 U.S.C. § 224 ("Section 224"), Pet. 16-19, creates a conflict with a decision of the D.C. Circuit, Pet. 19-20, and undermines the purposes underlying Section 224 and the 1996 Telecommunications Act on an issue of surpassing national importance. Pet. 20-25. Respondents fail to undermine any of these conclusions.

Respondents' arguments for avoiding review by this Court are essentially two-fold. First, they contend that the court of appeals properly concluded that Congress intended to deny cable operators the regulatory protections established by Section 224 if they choose to commingle Internet service with their traditional video programming services. Opp. 8-13. Second, they insist that the decision below is not important because Section 224 is no longer necessary to ensure access to bottleneck facilities, Opp. 16-17, and, in any event, Section 224 has little practical effect because, in respondents' view, their ability to charge excessive rates for access to bottleneck facilities is constitutionally protected and therefore "will not be affected one way or another by a decision regarding Section 224 coverage." Opp. 7.

As demonstrated below, respondents are mistaken on both counts. The court of appeals' decision improperly rejected the FCC's reasonable construction of Section 224. Indeed, the central fallacy in the court of appeals' ruling was its

conclusion that Congress intended to repeal the regulatory authority that the FCC admittedly possessed over pole attachments "'regardless of the type of service provided over the equipment attached to the poles,'" *Texas Utils. Elec. Co.* v. *FCC*, 997 F.2d 925, 927 (D.C. Cir. 1993), by "expand[ing] the scope of the coverage of section 224." H.R. Conf. Rep. No. 104-458, at 206 (1996). That error is highlighted by respondents' efforts to reconcile the decision below with the D.C. Circuit's *Texas Utilities* decision. Moreover, respondents never explain why Congress would have stripped cable operators of regulatory protection for providing a service that Congress expressly sought to promote.

As to the importance of the case, respondents ignore that this is a consolidated, nationwide appeal arising out of Hobbs Act review involving "the competing interests of [power] companies, telephone companies, cable television companies, . . . Internet service providers, and . . . consumers" on an issue "that may affect every person who uses . . . Internet service in this country." Pet. App. 96a. Nor do they dispute that the issue presented here cannot be relitigated in any other court of appeals. Their claims that Section 224 is no longer necessary and, in any event, has no impact on the rates respondents will charge are easily refuted. The notion that Section 224 is no longer necessary is no more than a misguided dispute with Congress regarding its decision in 1996 to amend Section 224 to *expand* its regulatory scope. Moreover, respondents' claim that they are constitutionally entitled to recover so-called monopoly "market rates" for providing access to essential bottleneck facilities is contrary to settled law, and, if accepted, would render all rate regulation of monopoly enterprises unconstitutional.

In short, this case squarely presents an issue of national importance that was improperly decided by the court of appeals and should be resolved by this Court.

1. Respondents' primary argument for avoiding review by this Court is their contention that the court of appeals'

holding is correct. Opp. 8-10. Respondents do not dispute that Section 224(b)(1) provides a "general grant of power to the FCC to regulate the 'rates, terms, and conditions for pole attachments,'" Opp. 8 (quoting 47 U.S.C. § 224(b)(1)), or that, as a result of the 1996 amendments, the definition of "pole attachment" was broadened to include "any attachment by a cable television system or provider of telecommunications service." 47 U.S.C. § 224(a)(4). They argue, however, that the court of appeals properly "held that the FCC's general grant of power in Section 224(b)(1) to regulate pole attachments is *defined and limited* by the specific standards set out in subsections (d) and (e) for attachments used for cable service and telecommunications service." Opp. 9. Specifically, they contend that, apart from the rates set forth in subsections (d) and (e), "'*no other rates are authorized.*'" *Id.* (quoting Gov't Pet. App. 27a). Their argument is without merit.

a. Nothing in subsections (d) and (e) limits the FCC's general authority to regulate the "rates, terms, and conditions" of "any attachment used by a cable television system." Rather, subsections (d) and (e), by their terms, set forth the rate structures that the FCC should apply under two specific circumstances: where a cable television system provides "solely . . . cable service," 47 U.S.C. § 224(d)(3), and where a telecommunications carrier provides "telecommunications services," *id.* § 224(e)(1). As to all other circumstances, the FCC still must ensure that the rates, as well as the terms and conditions, are "just and reasonable." *Id.* § 224(b)(1).

Moreover, Congress was aware that there were "other" circumstances when it enacted the 1996 amendments to Section 224. Prior to those amendments, the FCC concluded that it was authorized to regulate the "rates, terms, and conditions" for pole attachments "'regardless of the type of service provided over the equipment attached to the poles,'" and that determination was affirmed on appeal. *Texas Utils.*, 997 F.2d at 927. Thus, respondents' position is that

Congress, by expanding Section 224 and setting forth the rates that would apply in two specific circumstances, repealed, by negative implication, the FCC's authority over the "rates, terms, and conditions" of "pole attachments" in all other circumstances. See Opp. 9. That conclusion is contrary to the "cardinal principle . . . that repeals by implication are not favored," *United States* v. *United Continental Tuna*, 425 U.S. 164, 168 (1976), and that a party advocating such a repeal "bears a heavy burden of persuasion," *Amell* v. *United States*, 384 U.S. 158, 165 (1966).

Respondents' argument that "'the specific governs the general'" comes nowhere close to meeting that "heavy burden." Opp. 9 (quoting *Morales* v. *TWA, Inc.*, 504 U.S. 374, 384 (1992)); see also *Crawford Fitting Co.* v. *J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987). That principle of statutory construction applies only if there is a conflict between a general and a specific statutory provision so that the "specific statute" will not be "nullified by a general one." *Id.*; accord *Morales*, 504 U.S. at 385. Here, however, there is no conflict between the general grant of authority to regulate "rates, terms, and conditions" of "any" pole attachment under subsection (b)(1) and the "specific" requirements of subsections (d) and (e). To the contrary, when read together, the "specific" provisions define how the FCC should meet its "general" responsibility of ensuring "just and reasonable" rates in two specific cases but do not otherwise limit the FCC's "general" authority to regulate "any" pole attachment.

Respondents argue that Congress "can not reasonably be assumed to have provided highly detailed standards for cable and telecommunications attachments, yet to have provided *no* standards for attachments for *other* services." Opp. 9. That is wrong for two reasons. First, Congress has, in fact, provided a standard for "attachments for *other* services" by dictating that "rates, terms, and conditions" must be "just and reasonable." 47 U.S.C. § 224(b)(1).[1] Second, it is entirely reasonable for Congress (i) to grandfather the pre-existing rate scheme by dictating that cable operators that provide "solely cable service" will continue to be governed by subsection (d); (ii) to ensure that "telecommunications carriers" that provide telecommunications services are all subject to the rate structure in subsection (e); and (iii) to allow the FCC to prescribe "just and reasonable" rates for "attachments" in all other circumstances.

The FCC's interpretation of Section 224 also furthers and is consistent with the core pro-competitive purposes underlying the 1996 Act. And even if Section 224 were ambiguous on the question whether the FCC's authority has been expanded, respondents offer no response to the settled law dictating that the FCC's reasonable interpretation must prevail. *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999); *Chevron, U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-43 (1984).

b. Similarly, respondents also are mistaken in arguing that "the Eleventh Circuit's ruling does not conflict with the D.C. Circuit's decision in *Texas Utilities*." Opp. 10. Of course, as we previously noted, the court of appeals "argued that its decision could be reconciled with the D.C. Circuit's." Pet. 20. But respondents do nothing to undermine the conclusion that the court of appeals' efforts in this regard were unpersuasive and merely highlight its misreading of Section 224. Pet. 20-23. In fact, respondents make the same error as the court of appeals, Pet. App. 28a n.32, when they "sever" subsection (b) from the statute and argue that "the

[1] Respondents' claim that a "just and reasonable" standard calls "into question whether the statute violates the non-delegation doctrine," Opp. 9, is frivolous. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 600-01 (1944) (upholding "just and reasonable" standard for FPC ratemaking). Indeed, under respondents' view, the core of the Communications Act of 1934 is of doubtful constitutionality because it requires that "[a]ll charges, practices, classifications and regulations for . . . communication service, shall be *just and reasonable*." 47 U.S.C. § 201(b) (emphasis added).

amended [Section 224] presents 'an entirely different situation' from that faced by the D.C. Circuit" because "subsections (d) and (e)" specify "that 'solely cable services' and 'telecommunications services' are to receive regulated rents." Opp. 10-11. Section 224 says no such thing. It provides that pole attachments used for "solely cable services" will receive the regulatory treatment set forth in subsection (d); those used for "telecommunications services" will receive the regulatory treatment set forth in subsection (e); and, for all other pole attachments, the FCC must ensure "just and reasonable" rates under subsection (b).

Respondents never address the central flaw underlying the court of appeals' efforts to distinguish *Texas Utilities*. According to the court of appeals, it was "faced with an entirely different situation" because the amendments to Section 224 *limited* the scope of the FCC's authority under Section 224. But the amendments to Section 224 quite clearly *increase* the scope of the FCC's authority by expanding the definition of "pole attachment" to cover "provider[s] of telecommunications service." 47 U.S.C. § 224(a)(4); H.R. Conf. Rep. No. 104-458, at 206 (amendment "expands the scope of coverage of section 224").

c. Respondents erroneously contend that the court of appeals' decision – which penalizes cable operators if they provide Internet services over the same lines they use to provide traditional video programming services by withdrawing regulatory protections from both services – is consistent with Congress' policy of promoting deployment of high-speed Internet services. Opp. 11-13.

First, respondents mischaracterize 47 U.S.C. § 230(b)(2), which expresses a policy "to preserve the vibrant and competitive free market that presently exists for the Internet." *Id.* The FCC's construction of Section 224 does not regulate providers of Internet services. Instead, it ensures providers of Internet services access to essential inputs at "just and reasonable" rates. Congress understood the difference – in

similar fashion, it required that providers of high-speed access to the Internet be given access to monopoly telephone lines, and properly recognized that this requirement promotes, rather than interferes with, the "free market" for Internet services. See *id.* § 251(c)(3); Order On Remand, *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 15 FCC Rcd 385, 389 (¶ 9) (1999).

Second, respondents argue that interpreting Section 224 to exclude Internet service provided by cable operators "merely levels the competitive playing field for the delivery of Internet service" because "incumbent local exchange carriers," who are "the cable industry's largest competitors in the delivery of Internet service" are excluded from Section 224. Opp. 12. That argument is baseless. As respondents point out, Congress enacted Section 224 in response to complaints by cable operators "that some utilities (*principally telephone companies*) had exploited their 'monopoly' position over these 'bottleneck facilities' by charging excessive rates for pole attachments." Opp. 1 (emphasis added). Indeed, Section 224(a)(1) includes "local exchange carrier[s]" as part of its definition of the "utilities" that must provide access to their facilities. Accordingly, incumbent local exchange carriers ("ILECs") had no need for Section 224 because "poles, ducts, and conduits are usually owned by telephone and electric power utility companies, which often have entered into joint use or ownership agreements." S. Rep. No. 95-580, at 12 (1977). Thus, withdrawing the regulatory protections of Section 224 from cable operators offering Internet service does not "level" the playing field because ILECs obviously are not, and have not been, subject to "excessive rates" for access to poles, conduits and ducts that they already own or control.[2]

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[2] As for "facilities-based Internet service providers which are not cable companies or telecommunications carriers," respondents fail to identify any such entities. Opp. 12. Indeed, they acknowledge that "'[m]ost'" residential and small business consumers receive Internet from "'ISP's via

d. Respondents argue that review should be denied to avoid "a premature consideration of the proper regulatory classification of Internet service," Opp. 13, which "should be made in the first instance by the policy-making branches of government, on the basis of a full and complete record." Opp. 15. That argument is exactly backwards. It was the court of appeals that brushed aside the FCC's statement that it need not decide "the precise category into which Internet services fit," Pet. App. 66a (¶ 34), ignored that the FCC's analysis of this issue was ongoing, *id.* (¶ 33), and instead decided that Internet service provided over a cable system was neither a cable nor a telecommunications service. *Id.* at 26a-29a. In doing so, the court of appeals did not, as respondents argue, "merely appl[y] the FCC's existing pronouncements about the nature of Internet services as it found them." Opp. 14.

Rather, the court of appeals engaged in its own independent analysis and concluded that Internet service was not "a cable service," Pet. App. 26a-28a, and that "there is no statutory basis for the FCC to regulate the Internet as a telecommunications service." *Id.* at 29a. As the FCC pointed out, resolution of that issue was unnecessary because the "definition of 'pole attachment' does not turn on what type of service the attachment is used to provide." *Id.* at 63a (¶ 30). Accordingly, review by this Court would not result in a premature resolution of the proper regulatory classification of Internet service, but rather would vacate and render unnecessary the court of appeals' efforts to do precisely what respondents now contend is improper.[3]

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traditional "dial-up" telephone services provided by local exchange carriers.'" Opp. 12 n.5; *see also* Second Report, *Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Americans*, CC Docket No. 98-146, ¶ 71 (FCC Aug. 21, 2000) (noting that cable operators and telephone companies providing DSL account for almost 95% of high-speed services to residential and small business subscribers).

[3] Even if this Court ultimately rejected the FCC's analysis and concluded that Section 224 applied only to cable and telecommunications services,

2. Even though the decision below was rendered in a nationwide, consolidated appeal regarding "industry-shaping issues of exceptional importance" that "may affect every person who uses . . . Internet service in this country," Pet. App. 96a, respondents insist that the denial of review will not harm the deployment of high-speed Internet service. Opp. 15. That argument is without merit.

a. Respondents are wrong in arguing that the decision below merely requires cable operators "to pay the same rates as their competitors." Opp. 15. As demonstrated above, *supra* 7, the ILECs, who respondents acknowledge are the cable industry's principal competitors for the provision of high-speed Internet service, are not subject to the same "excessive rates" as cable operators because they already own or control the facilities to which the cable operators require access. Indeed, the fact that cable operators must seek access to these essential bottleneck facilities from their largest competitors highlights the importance of ensuring that the "rates, terms, and conditions" of that access are "just and reasonable." 47 U.S.C. § 224(b)(1).

b. Respondents contend that they are constitutionally entitled to "charge a market rate for pole attachments" and therefore "there will be *no* practical consequences of a denial of the petitions, since cable companies will be charged a market rate for commingled cable/Internet attachments" "irrespective" of whether Section 224 applies. Opp. 16. That argument is frivolous. Even if the access requirement of Section 224 constituted a taking, Pet. App. 17a-19a, this Court has made clear that there is no "rigid rule for determining what is 'just compensation' under all circumstances and in all cases." *United States* v. *Commodities Corp.*, 339 U.S. 121, 123 (1950). Rather, "the

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the proper course would be to remand the case to the FCC so that it could decide, in the first instance, the correct regulatory classification for Internet access services provided by a cable operator.

dominant consideration always remains the same: What compensation is 'just' both to an owner whose property is taken and to the public that must pay the bill?" *Id.* Respondents have no support for the notion that "just compensation" is the "market rate" charged by a monopoly for access to essential bottleneck facilities. Indeed, under respondents' view, rate regulation of monopolies would be unconstitutional unless the regulated rates were equal to the monopoly "market price" that was the predicate for the rate regulation in the first place.[4]

c. Respondents finally argue that this case is not important because Section 224 is no longer relevant in that "utility poles and conduits . . . are almost never bottleneck facilities today." Opp. 16. But their assessment is nothing more than a misguided disagreement with Congress, which, in 1996, properly recognized the continuing need for such regulation when it amended Section 224 to "expand[] the scope of [its] coverage." H.R. Conf. Rep. 104-458, at 206. For example, respondents point to a 1962 Los Angeles regulation, Opp. 17 n.8, to argue that a federal statute enacted in 1978 and expanded in 1996 is no longer justified. Even if respondents were entitled to second-guess Congress, their argument that pole attachments are irrelevant because wireline facilities are being "buried underground" ignores that Section 224 also applies to underground rights-of-way "owned or controlled" by utilities. 47 U.S.C. § 224(a)(4).

CONCLUSION

For these reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

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[4] Respondents improperly point to current *regulated* rates, Opp. 16, to argue that their *unregulated* monopoly rates would be, in their view, relatively small. In doing so, respondents do not dispute that utilities have imposed a 500 per cent rate increase after the decision below. Pet. 14.

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IN THE

Supreme Court of the United States

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioner,

v.

GULF POWER COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF PETITIONER

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether 47 U.S.C. § 224 applies to attachments by cable television systems that are simultaneously used to provide high-speed Internet access and conventional cable television programming.

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings in the Eleventh Circuit are listed in Appendix A and Appendix G of NCTA's Petition for Certiorari at 1a-4a, 104a.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that it has no parent corporations and it has issued no publicly held stock.

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IN THE

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No. 00-832

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is published at 208 F.3d 1263 (11th Cir. 2000) and is reproduced in the Appendix to National Cable Television Association, Inc.'s ("NCTA's") Petition for Certiorari ("NCTA Pet. App.") at 1a-37a. The *Report and Order* of the Federal Communications Commission ("FCC" or "Commission") is published at *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 (1998). Relevant portions of the *Report and Order* are reproduced at NCTA Pet. App. 38a-68a. The court of appeals' orders denying the petitions for rehearing are unpublished, and its order denying the petitions for rehearing *en banc* is published at 226 F.3d 1220 (11th Cir. 2000) (per curiam). Those orders are reproduced at NCTA Pet. App. 77a-96a. The court of appeals' order staying the mandate

pending the filing and resolution of a petition for certiorari is unpublished and is reproduced at NCTA Pet. App. 69a-76a.

JURISDICTION

The court of appeals entered judgment on April 11, 2000, and denied timely petitions for rehearing and rehearing en banc on September 12, 2000. NCTA's petition for a writ of certiorari was filed on November 22, 2000, and was granted on January 22, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The statutes relevant to this case are: 47 U.S.C. § 224 ("Section 224"), as amended by Section 703 of the Telecommunications Act of 1996 ("1996 Act"); Section 706 of the 1996 Act, which is codified at 47 U.S.C. § 157, statutory note; and Section 509 of the 1996 Act, which is codified, in pertinent part, at 47 U.S.C. § 230(b). The text of these provisions is included in the appendix to this brief.

STATEMENT OF THE CASE

This case presents the issue whether cable television systems that choose to provide high-speed Internet access services, using the same lines they simultaneously use to provide traditional video programming, thereby forfeit the regulatory oversight that Congress provided in Section 224 to ensure their nondiscriminatory access to essential bottleneck facilities owned or controlled by utilities at "just and reasonable" "rates, terms, and conditions."

The clear answer is no. First, and foremost, the plain language of Section 224 provides that these regulatory protections extend to "any attachment" by a cable television system. Further, the background of settled administrative and judicial decisions (against which Congress amended Section 224) also establishes that these regulatory protections extend

to attachments by cable operators used for "commingled" video and data services. Finally, the purposes underlying Section 224 and the 1996 Act – *i.e.*, to provide access to bottleneck facilities and to speed deployment of new and advanced services – further confirm that the FCC is required to ensure that the "rates, terms, and conditions" of pole attachments used by cable television systems to provide high-speed Internet access (as well as traditional video programming) are "just and reasonable" and "nondiscriminatory."

The court of appeals' contrary conclusion that Congress sought to limit the scope of the Commission's existing authority is inconsistent with the language of Section 224, ignores that implied repeals are disfavored, and is predicated on a misreading of the 1996 amendments to Section 224. But even if Congress' amendments to Section 224 were ambiguous on this point, the law is clear that Congress intends that such ambiguities be resolved by the administrative agency charged with implementing Section 224. Here, the FCC concluded that cable television systems do not forfeit Section 224 rights to nondiscriminatory access and regulatory oversight of the "rates, terms, and conditions" of their pole attachments by choosing to use those attachments to provide high-speed Internet access as well as traditional video programming. That conclusion is eminently reasonable and therefore is entitled to deference.

A. The Cable Television Industry.

As this Court has noted, the "role of cable television in the Nation's communications system has undergone dramatic change over the past" half century. *Turner Broad. Sys., Inc.* v. *FCC*, 521 U.S. 623, 627 (1994). Nevertheless, throughout this period of explosive growth and change, one technological fact has remained constant: cable systems "rely upon a physical, point-to-point connection" to provide services to their individual subscribers. *Id.* at 627-28.

1. Cable television has its roots in "community antenna television" or "CATV," which first was established more than fifty years ago. See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 162 n.12 (1968); see also H.R. Rep. No. 89-1635, at 5 (1966). Initially, CATV operated as nothing more than a powerful and sophisticated television antenna. "CATV systems receive[d] the signals of television broadcasting stations, amplif[ied] them, transmit[ted] them by cable or microwave, and ultimately distribute[d] them by wire to the receivers of their subscribers." *Southwestern Cable*, 392 U.S. at 161. Thus, CATV systems originally performed only two functions: they (i) "supplement[ed] broadcasting by facilitating satisfactory reception of local stations in adjacent areas in which such reception would not otherwise be possible," and (ii) "transmit[ted] to subscribers the signals of distant stations entirely beyond the range of local antennae." *Id.* at 163.[1]

To carry out these functions, CATV systems typically consisted of "antennas located on hills . . . with connecting coaxial cables, strung on utility poles, to carry the signals received by the antennas to the home television sets of individual subscribers." *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390, 392 (1968). In addition, CATV systems "contain[ed] equipment to amplify and modulate the signals received, and to convert them to different frequencies, in order to transmit the signals efficiently while maintaining and improving their strength." *Id.* As this Court has explained, the purpose of these earliest

[1] *See also Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390, 399 (1968) ("[A] CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set."); J. Goodale, *All About Cable* § 1.02, at 1-6 (2000) ("Goodale, *Cable*") (describing functions of earliest CATV systems); 1 D. Brenner, *et al.*, *Cable Television and Other Nonbroadcast Media* § 1.02[1], at 1-2 (14th rel. 2000) ("Brenner, *Cable Television*") (same).

CATV systems "was not to replace broadcast television but to enhance it." *Turner*, 512 U.S. at 627.

Although early "CATV systems characteristically d[id] not produce their own programming," there was "no technical reason why they [could] not." *Southwestern Cable*, 392 U.S. at 161-62 & n.9. By the late 1960's, engineers developed ways of providing additional channel capacity through "coaxial cable." Brenner, *Cable Television*, § 1.02[2], at 1-3. CATV filled that "additional channel capacity" with its own programming, which "initially consisted of simple arrangements . . . using automated cameras providing time, weather, news ticker, or stock ticker information, and aural systems with music or news announcements." *Teleprompter Corp.* v. *Columbia Broad. Sys., Inc.*, 415 U.S. 394, 404 n.8 (1974).

By the early 1970's, "program origination" by CATV was "expanded to include coverage of sports and other live events, news services, moving picture films, and specially created dramatic and non-dramatic programs." *Id.* at 404 n.8. Because CATV no longer operated as solely a community antenna service, the FCC "adopted the 'more inclusive term cable television systems.'" *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 702 n.7 (1984). That change in nomenclature reflected the FCC's recognition that "cable's multichannel or broadband capacity" could provide a broad array of services to its subscribers. *Heritage Cablevision Assocs.* v. *Texas Utils. Elec. Co.*, 6 FCC Rcd 7099, 7102 (¶ 17) (1991), *aff'd*, 997 F.2d 925 (D.C. Cir. 1993).

Specifically, in addition to "program origination," the FCC recognized, as early as 1972, that cable television's "broadband or multichannel capacity" could be used to provide:

> [F]acsimile reproduction of newspapers, magazines, documents, etc.; electronic mail delivery; merchandising; business concern links to branch offices, primary

> customers or suppliers; access to computers; e.g., man to computer communications in the nature of inquiry and response (credit checks, airline reservations, branch banking, etc.), information retrieval (library and other reference material, etc.), and *computer to computer communications* . . . .

Cable Television Report & Order, 36 FCC2d 143, 144 n.10 (¶ 1) (1972) (alteration in original) (emphasis added).[2] By the 1980s, the cable television industry was, in fact, providing its subscribers "nonvideo communications services, such as data transmission." *Texas Utils. Elec. Co.* v. *FCC*, 997 F.2d 925, 927 (D.C. Cir. 1993).

More recently, technological advances have allowed cable operators, who collectively have invested billions of dollars in the effort, to upgrade their existing coaxial cables and other equipment so that they can simultaneously carry both traditional video programming services and high-speed or "broadband" access to the Internet at data transmission speeds hundreds of times faster than the "narrowband" services available through traditional telephone lines. See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, FCC No. 00-355, slip op. ¶ 8 & n.12 (FCC Sept. 28, 2000) (explaining that this Internet service is offered by "incumbent cable operators and new entrants" that "can be part of either small, independent companies or large

[2] In 1970, the FCC explained that "CATV service represents the initial practical application of broadband cable technology" and that "there is a substantial expectation that broadband cables, in addition to CATV services, will make economically and technically possible a wide variety of new and different services involving the distribution of data, information storage and retrieval, and visual, facsimile and telemetry transmission of all kinds." Final Report & Order, *Section 214 Certificates*, 21 FCC2d 307, 324-25 (¶ 47) (1970), *aff'd*, 449 F.2d 846 (5th Cir. 1971) ("*Section 214 Certificates*").

nationwide companies").[3] Such facilities have made cable an ideal medium for transmitting large amounts of digital information – data, graphics, and video – at high speeds.

Not surprisingly, the cable industry actively competes against numerous segments of the communications industry to provide high-speed Internet services to consumers nationwide. See Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecomms. Act of 1996*, 14 FCC Rcd 2398, 2404 (¶ 12) (1999) ("*Section 706 Report*"). Provision of such high-speed Internet services is important because, as the FCC has noted, "[w]idespread access" to high-speed or broadband Internet services "can increase our nation's productivity and create jobs" as well as "meaningfully improve our educational, social, and health care services." *Id.* at 2401 (¶ 2). Indeed, the FCC has concluded that development of such services will provide consumers with "the ability to download feature-length movies in a matter of minutes," "change web pages as fast as changing the channel on a television" and create "new possibilities . . . for electronic commerce." *Id.* (¶ 3).

The cable television industry has been instrumental in the development of high-speed Internet service. See *id.* at 2415-16 (¶ 37) (describing multi-billion dollar investments by cable operators to develop high-speed Internet access). For

[3] As this Court recently explained, "[t]he Internet is an international network of interconnected computers," *Reno* v. *ACLU*, 521 U.S. 844, 849, 850 (1997), and "[a]nyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods." *Id.* at 851. For example, "[t]he best known category of communication over the Internet is the World Wide Web," which "consists of a vast number of documents stored in different computers all over the world," and "which allows users to search for and retrieve information stored in remote computers" and "to communicate back to designated sites." *Id.* at 852.

example, in August 2000, the Commission reported that 1.4 million of the 1.8 million high-speed lines to residential homes and small businesses were provided through cable technology. Second Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, slip op. ¶ 71 & Fig. 5 (FCC Aug. 21, 2000). More recently, the Commission reported that there were 4.3 million broadband or high-speed lines connecting homes and small businesses to the Internet and that the cable industry provided about 2.2 million such lines.[4] The development of these services by the cable industry is likewise spurring development and deployment of competing high-speed services (known as "DSL") by telephone companies. See *Section 706 Report*, 14 FCC Rcd at 2419 & n.84 (¶ 42).

These changes in the scope of services offered by the cable television industry over the past fifty years have been matched by the equally "explosive" growth of the cable industry. *Southwestern Cable*, 392 U.S. at 163. As noted above, the first commercial CATV system was established in 1950. *Id.* at 162. By 1959, "there were 550 'nationally known and identified' systems serving a total audience of 1,500,000 to 2,000,000 persons." *Id.* By 1977, there were 3,000 cable systems with 11 million subscribers. By the mid 1980's, nearly 53 million households subscribed to cable services. Today, almost seven of ten television households (more than 65 million) subscribe to cable television.

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[4] *See* Press Release, FCC, Federal Communications Commission Releases Data on High-Speed Services for Internet Access 1 (Oct. 31, 2000), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/News_Releases/2000/nrcc0054.doc ("FCC, *Data on High-Speed Services for Internet Access*").

2. Although the cable industry has undergone a remarkable transformation over the past 50 years, it remains equally true today that "to deliver television signals to their subscribers," cable operators "must have a physical carrier for the cable." *FCC* v. *Florida Power Corp.*, 480 U.S. 245, 247 (1987). Cable systems still "make this connection much like telephone companies, using cable or optical fibers strung aboveground or buried in ducts to reach the homes or businesses of subscribers." *Turner*, 512 U.S. at 628. In fact, "virtually the only practical physical medium for installation of television cables" has been poles, ducts, and rights-of-way owned or controlled by local utilities. *Florida Power*, 480 U.S. at 247. Accordingly, a cable system's "right to secure the use of those facilities on reasonable terms may be crucial to its very existence." Goodale, *Cable* § 6.01, at 6-3.

The vast majority of cable lines are strung aboveground and are attached to utility poles that "are 35 and 40 feet high." *Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 72 FCC 2d 59, 69 (¶ 21) (1979), *aff'd*, 655 F.2d 1254 (D.C. Cir. 1981). The entire length of the pole, however, cannot be used for attachments. Thus, for example, a 35-foot utility pole generally "has 6 feet of its height underground and 18 feet reserved for ground clearance," leaving 11 feet of usable space. *Id.* at 68 n.21 (¶ 20). For safety reasons, electric "power lines generally are located on the upper-most portion of utility poles," and require "a 40 inch safety space between electric lines . . . and communications cables on the same pole." *Id.* at 69-70 (¶ 22). Telephone lines typically are located "at the minimum ground clearance of 18 feet." *Id.* at 69 (¶ 22).

Cable attachments are located in between, "1 foot above telephone cables," *id.*, and "are usually strung along metal lashing strands which make them less likely to sag." Brenner, *Cable Television* § 5.02[2][b], at 5-7. According to the FCC, the actual space occupied by cable attachments is "approximately 1 inch." *Adoption of Rules for the Regulation*

of Cable Television Pole Attachments, 77 FCC2d 187, 190 (¶ 8) (1980), *aff'd*, 655 F.2d 1254 (D.C. Cir. 1981). Cable operators also rely on "'overlashing,'" whereby "a new cable is wrapped around an existing wire, rather then being strung separately." *Implementation of the Local Competition Provisions in the Telecomm. Act of 1996*, 11 FCC Rcd 15499, 16075 (¶ 1161) (1996).

High-speed Internet access services offered by cable operators are "commingled" with traditional cable video services "on one transmission facility." NCTA Pet. App. 63a (¶ 30). Accordingly, cable operators that provide high-speed Internet access services and traditional cable video services must rely on utilities for reasonable and affordable access to the same "poles, ducts, conduits, or rights-of-way" necessary to deliver traditional cable services to their subscribers. Moreover, provision of commingled video and Internet access services places no additional burden on the utility facilities necessary to provide these commingled services. As a result of the pro-competitive provisions of the 1996 Act, however, pole-owning utilities have a greater incentive to deny such access on reasonable "rates, terms, and conditions" because the 1996 Act lifts restrictions that prohibited some utilities from diversifying into telecommunications and other services so that now they too can compete directly against cable entities and other communications providers. See Pub. L. No. 104-104, § 103, 110 Stat. 56, 81-86 (1996) (codified at 15 U.S.C. § 79z-5c).

Today, as much as ever before, the cable industry still must rely upon its actual and potential competitors for reasonable access to facilities that are necessary to provide its services to individual subscribers.

B. Statutory And Regulatory Background.

Congress has acted to ensure that cable operators have access to these bottleneck facilities on reasonable and nondiscriminatory "rates, terms, and conditions." In doing so,

Congress has recognized that federal regulatory oversight is necessary to ensure that utilities that own and control these facilities do not engage in anti-competitive conduct that would deny such access and thereby hinder the further development of the cable industry.

1. In 1978, in response to mounting evidence that utility companies were exploiting their monopoly power over bottleneck facilities needed by cable television systems to deliver their services to consumers, Congress enacted the Pole Attachment Act ("1978 Act"). See *Florida Power Corp.*, 480 U.S. at 247. At the time, approximately 95 percent of cable's lines to their subscribers were installed on utility poles. S. Rep. No. 95-580, at 12 (1977). "In many communities," "because of the lack of available rights-of-way, environmental restrictions, or zoning laws," cable operators were "unable to construct [their] own pole plant for the attachment of [their] coaxial cable" and instead were required "to use existing utility company poles." H.R. Rep. No. 94-1630, at 5 (1976). Specifically, the cable industry used "existing poles rather than newly placed poles due to the reluctance of most communities, based on environmental considerations, to allow an additional, duplicate set of poles to be placed." H.R. Rep. No. 95-721, at 2 (1977).[5] Thus, just before the 1978 Act was passed, "the number of poles owned or controlled by cable companies [was] insignificant, estimated to be less than 10,000, as compared to the over 10 million utility-owned or controlled poles to which CATV lines are attached." S. Rep. No. 95-580, at 13.

As a result, "public utilities by virtue of their size and exclusive control over access to pole lines, are unquestionably

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[5] *Accord* S. Rep. No. 95-580, at 13 (1977) ("Owing to a variety of factors, including environmental or zoning restrictions and the cost of erecting separate CATV poles or entrenching CATV poles underground, there is often no practical alternative to a CATV system operator except to utilize available space on existing poles.").

in a position to extract monopoly rents from cable TV systems in the form of unreasonably high pole attachment rates." S. Rep. No. 95-580, at 13. Moreover, the danger of anti-competitive conduct was heightened because "the introduction of broadband cable services may pose a competitive threat to telephone companies" that owned or controlled these facilities. *Id.* In particular, then-FCC Chairman Richard E. Wiley informed Congress of the basis for that competitive threat:

> Cable operators foresee systems developing into two-way home communications centers through which subscribers may shop for merchandise, order facsimile newspapers, conduct banking business, and have utility meters read. Many of these services are now technically feasible, and already a few systems are offering burglar alarms and fire alarm, facsimile, and preference polling services.

Cable Television: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Sci., and Transp., 95th Cong. 3 (1977).[6]

In light of this evidence, Congress passed the 1978 Act "[t]o establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unreasonable pole attachment practices on the wider development of cable television service to the public." S. Rep. No. 95-580, at 14. The 1978 Act defined the

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[6] *See Section 214 Certificates*, 21 FCC2d at 324-25 (¶¶ 46-47) (explaining that Commission adopted restrictions on telephone common carriers' ownership and operation of "CATV" facilities to "prevent" abuses of pole attachment agreements that would (i) "preempt" development of CATV and (ii) extend telephone monopoly "to broadband cable facilities and the new and different services such facilities are expected to be providing in the future"); *see also Better T.V., Inc.* v. *New York Tel. Co.*, 31 FCC2d 939, 966 (¶ 68) (1971) (concluding that telephone company used its ownership and control over "utility poles" to "eliminat[e] the requesting CATV operator as a competitor").

term "pole attachment" as "*any attachment* by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility." Pub. L. No. 95-234, sec. 6, § 224(a)(4), 92 Stat. 33, 35 (1978) (codified, as amended, at 47 U.S.C. § 224(a)(4)) (emphasis added). Congress further provided in subsection (b)(1) that the FCC "shall regulate" not only the "rates" but also the "terms, and conditions" for pole attachments "to provide that such rates, terms, and conditions are just and reasonable." *Id.* sec. 6, § 224(b)(1), 92 Stat. at 35 (codified, as amended, at 47 U.S.C. § 224(b)(1)).

As to the requirement of a "just and reasonable" rate, Congress directed that, as an initial matter, a "rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space . . . which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole . . . ." *Id.* sec. 6, § 224(d)(1), 92 Stat. at 36 (codified, as amended, at 47 U.S.C. § 224(d)(1)). It was thus the Commission's responsibility "to ensure that the pole attachment rates charged cable operators do not fall below the statutory minimum – incremental costs – or above the statutory maximum – fully allocated costs." *Alabama Power Co.* v. *FCC*, 773 F.2d 362, 364 (D.C. Cir. 1985).

Similarly, the Commission was authorized and obligated to ensure that the "terms, and conditions" of pole attachment agreements also were "just and reasonable." As the Commission subsequently explained, if "a term or condition of a pole attachment agreement is found to be unjust or unreasonable, it is unlawful." *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 4 FCC Rcd 468, 471 (¶ 25) (1989). If the FCC makes that determination, "a cable company may be entitled to a rate adjustment or the term or condition may be invalidated." *Id.* (¶ 26).

The Commission's rules implementing the 1978 Act and, in particular, its "procedure for determining whether rates" for attachments by cable television systems "are just and reasonable," were affirmed by the D.C. Circuit. *Monongahela Power Co.* v. *FCC*, 655 F.2d 1254, 1256 (D.C. Cir. 1981) (per curiam). The *Monongahela* Court explained that "[t]he statute itself is all-encompassing in its wording: the FCC is to 'regulate the rates, terms, and conditions for pole attachments to provide that [they] are just and reasonable.'" *Id.*

2. The scope of the FCC's authority to regulate "rates, terms, and conditions" subsequently became an issue because of the cable television industry's entry into "the growing market for nonvideo communications services, such as data transmission." *Texas Utils.*, 997 F.2d at 927. In 1989, TCI Cablevision ("TCI") filed a complaint with the FCC under Section 224, alleging that a utility pole owner unjustly and unreasonably had imposed a separate charge for the attachment of facilities employed to provide both video and nonvideo broadband communications services (e.g., data transmission services) that was greater than the regulated rate assessed "to attach equipment used to provide more conventional cable television services to subscribers." *Heritage*, 6 FCC Rcd at 7099 (¶ 1). The utility pole owner had charged TCI an "annual rental for 'standard' cable television pole attachments (approximately $5.00 per pole)" plus a "surcharge for providing nonvideo services over the facilities (approximately $50-$100 per pole . . .)." *Id.* at 7101 (¶ 9).

TCI's complaint presented the FCC with the issue whether Section 224 provided the Commission with "jurisdiction to regulate pole attachments supporting facilities to provide nontraditional cable television services." *Id.* (¶ 10). The Commission looked first to the language of Section 224. Because Section 224 (i) "applies to 'any' pole attachment by a cable television system," and (ii) "includes no language limiting the nature of the services of a cable operator to which it applies," the Commission concluded that "Section 224 is most reasonably read to provide that a cable operator may seek Commission-regulated rates for all pole attachments within its system, regardless of the type of service provided over the equipment attached to the poles." *Id.* (¶ 12) (footnote omitted).

The Commission next examined Section 224's legislative history, holding that it did not "support[] a conclusion that protecting traditional cable television service was Congress' *exclusive* concern." *Id.* at 7102 (¶ 16). To the contrary, the Commission noted that the legislative history referenced testimony "'that the introduction of *broadband cable services* may pose a competitive threat to telephone companies,'" *id.*, and that "the term 'broadband cable services' to which Congress was referring has commonly been understood throughout the years to include nonvideo services," *id.* (¶ 17). Accordingly, the Commission concluded that "Congress was aware of the Commission's longstanding view of cable as a provider of video *and* nonvideo services" and that "cable might not evolve beyond its traditional video offerings if utilities were able to employ overly restrictive pole attachment agreements to frustrate these potential competitors in the provision of nonvideo services." *Id.* at 7103 (¶ 18).[7] In short, the FCC ruled that the legislative history did "not indicate any congressional intent to draw a distinction or create a dichotomy between traditional and nonvideo broadband services over cable systems for purposes of [Section 224]." *Id.*

Finally, the Commission determined, as a matter of policy, that its interpretation of Section 224 was "more pro-

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[7] The Commission also concluded that the Cable Act of 1984, to the extent it was relevant, supported its conclusion that Section 224 applied to the data transmission services provided by TCI. *Heritage*, 6 FCC Rcd at 7104 (¶¶ 22-24).

competitive than the current situation where utilities . . . can forestall competition by cable operators in the data market by charging pole attachment rates that bear no relation to costs." *Id.* at 7105 (¶ 26). Although the FCC acknowledged that its conclusion "w[ould] afford cable television system operators an advantage over other competitors who are not entitled to pole attachment rates under Section 224," "Congress, in enacting Section 224, expressly limited its applicability to cable television systems." *Id.* at 7104, 7105 (¶ 26).[8]

The Court of Appeals for the District of Columbia Circuit affirmed the FCC's decision. *Texas Utils.*, 997 F.2d at 927. The D.C. Circuit held that the FCC's conclusion that Section 224 applies to all pole attachments by a cable operator "'regardless of the type of service provided over the equipment attached to the poles'" was "a permissible construction, rational and consistent with the congressional purpose in enacting the [1978 Act]." *Id.*

3. Against this background of administrative and judicial decisions, Congress enacted the 1996 Telecommunications Act ("1996 Act"). By its terms, the 1996 Act was designed to foster increased competition in the markets for the provision of communications services. See *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). The 1996 Act accomplishes

[8] Subsequently, the FCC resolved similar complaints by ruling that "Section 224 protects . . . pole attachments which support equipment used to provide nonvideo services in addition to video and other traditional cable television services." *WB Cable Assocs.* v. *Florida Power & Light Co.*, 8 FCC Rcd 383, 386 (¶ 21) (1993) (cable company providing security alarm services); *see also Selkirk Communications, Inc.* v. *Florida Power & Light Co.*, 8 FCC Rcd 387, 390 (¶ 21) (1993) (traditional and non-traditional cable services "[s]ometimes . . . provided in one cable, while at other times . . . provided by a separate cable"). In doing so, the Commission delegated its authority to resolve these cases to the Common Carrier Bureau because these cases "fail[ed] to raise either 'novel or unusual issues.'" *WB Cable*, 8 FCC Rcd at 383 n.3 (¶ 1); *Selkirk*, 8 FCC Rcd at 387 n.3 (¶ 1).

this goal, at least in part, by doing away with the economic and legal barriers put in place by government-granted incumbent monopolies, see, *e.g.*, 47 U.S.C. § 253, by allowing all competitors to compete in all markets, see, *e.g.*, 15 U.S.C. § 79z-5c; 47 U.S.C. § 541(b)(3)(B), and by requiring firms that control bottleneck facilities to share those facilities on regulated terms with firms that would use them to offer services to the public, see, *e.g.*, *id.* § 251(c)(3).

The 1996 Act also directs the FCC to encourage the development and deployment of high-speed Internet services. Specifically, Section 706 of the 1996 Act directs the Commission to "encourage the deployment . . . of advanced telecommunications capability to all Americans . . . by . . . regulating methods that remove barriers to infrastructure investment." 47 U.S.C. § 157, statutory note (a). In turn, "'advanced telecommunications capability'" is defined as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications." *Id.* statutory note (c).[9]

Consistent with the overarching purposes of this statutory regime, the 1996 Act also amended Section 224 to further these same pro-competitive goals. The protections provided by Section 224 were expanded to require that a utility "shall provide . . . nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. § 224(f)(1). Further, while the protections of Section 224 previously applied only to "attachments by a cable television system," the 1996 Act modified Section 224 to

[9] In addressing this directive, the FCC has focused on the development and availability of high-speed Internet service. *See, e.g.*, FCC, *Data on High-Speed Services for Internet Access* at 1. Indeed, in the 1996 Act, Congress announced that "[i]t is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media." 47 U.S.C. § 230(b).

extend its protections to "provider[s] of telecommunications service." Pub. L. No. 104-104, sec. 703(2), § 224(a)(4), 110 Stat. at 150 (codified at 47 U.S.C. § 224(a)(4)). These protections, however, were not extended to incumbent local exchange carriers, 47 U.S.C. § 224(a)(5), since they already own or control the poles, ducts, and conduits for which others require access.

Correspondingly, the structure of the Commission's rate mechanisms was modified in two ways. First, a new rate methodology – which the Senate report described as a "fully allocated cost formula," S. Conf. Rep. No. 104-230, at 206 (1996) – was added in subsection (e) that, when implemented by FCC regulations, would "govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services." 47 U.S.C. § 224(e)(1). Second, the pre-existing rate methodology in subsection (d) was expressly "grandfathered" "for any pole attachment used . . . solely to provide cable service." *Id.* § 224(d)(3).

Congress also was aware, however, of the "increasing convergence between cable and other electronic media." *Turner*, 512 U.S. at 627. In fact, Congress expressly acknowledged that both cable systems and telecommunications carriers would be protected by FCC-regulated rates for pole attachments used to provide "any telecommunications service." 47 U.S.C. § 224(d)(3). Thus, the Senate report explained that, under the amended Section 224, "to the extent that a company seeks pole attachment for a wire used solely to provide cable television services . . . , that cable company will continue to pay the rate authorized under current law." S. Conf. Rep. No. 104-230, at 206. "If, however, a cable television system also provides telecommunications services, then that company shall instead pay the pole attachment rate prescribed by the Commission pursuant to the fully allocated cost formula." *Id.*

Other aspects of Section 224 remained unchanged. Specifically, the 1996 amendments did not alter the language

of subsection (b), which grants the Commission general authority to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. § 224(b)(1). Further, Congress left untouched the specific language – *i.e.*, "any attachment by a cable television system," *id.* § 224(a)(4) – that the FCC had concluded was "most reasonably read to provide that a cable operator may seek Commission-regulated rates for all pole attachments within its system, regardless of the type of service provided over the equipment attached to the poles." *Heritage*, 6 FCC Rcd at 7101 (¶ 12) (footnote omitted).

C. The Commission's Report And Order.

Pursuant to its obligation to implement the amendments to Section 224, see 47 U.S.C. § 224(b)(2), the Commission considered whether the 1996 Act restricted the services that cable operators could provide over pole attachments while still being covered by Section 224. At the outset, the Commission explained that it did not write on a blank slate because prior to the 1996 Act, Section 224 unquestionably applied to "the provision by a cable operator of both traditional cable services and nontraditional services on a commingled basis over a single network" and "that a cable system providing both video and nonvideo broadband services is not excluded from the benefits of Section 224." NCTA Pet. App. 60a & n.111 (¶ 27) (citing *Texas Utils.*, 997 F.2d at 936).

The Commission concluded that its prior analysis regarding the scope of Section 224 had not been "'overruled' by the passage of the 1996 Act insofar as it held that a cable system is entitled to a Commission-regulated rate for pole attachments that the cable system uses to provide commingled data and video." NCTA Pet. App. 62a-63a (¶ 30). The Commission reasoned that under Section 224, as amended, the "definition of 'pole attachment' does not turn on what type of service the attachment is used to provide" but instead

"include[s] any attachment by a 'cable television system.'" *Id.* at 63a (¶ 30). Thus, the Commission explained that "the rates, terms and conditions for all pole attachments by a cable television system are subject to the Pole Attachment Act." *Id.* And, applying Section 224(b)(1), the Commission ruled that it "ha[d] a duty to ensure that such rates, terms, and conditions are just and reasonable." *Id.*

The Commission saw "nothing on the face of Section 224 to support the contention that pole owners may charge any fee they wish for Internet and traditional cable services commingled on one transmission facility." NCTA Pet. App. 63a (¶ 30). Specifically, the Commission highlighted that the "purpose of the amendments to Section 224 made by the 1996 Act," was "to remedy the inequitable position between pole owners and those seeking pole attachments," *id.* (¶ 31), and that the nature of that relationship "is not altered when the cable operator seeks to provide additional service," *id.* The Commission reasoned that if it were to interpret Section 224 to exclude cable operators that also provide Internet services, then Section 224 "would penalize cable entities that choose to expand their services in a way that will contribute 'to promot[ing] competition in every sector of the communications industry,' as Congress intended in the 1996 Act." *Id.* at 63a-64a (¶ 31) (alteration in original).

Thereafter, the FCC, pursuant to its authority under Section 224(b)(1), concluded that the "just and reasonable rate for commingled cable and Internet service is the Section 224(d)(3) rate." NCTA Pet. App. 64a (¶ 32). The Commission explained that it "intend[ed] to encourage cable operators to make Internet services available to their customers," and that adoption of "a higher rate might deter an operator from providing non-traditional services." *Id.* Specifically, the Commission ruled that adoption of the Section 224(d)(3) rate would "encourage greater competition in the provision of Internet service and greater benefits to consumers." *Id.* In reaching these conclusions, the

Commission expressly refrained from deciding "the precise category into which Internet services fit." NCTA Pet. App. 66a (¶ 34).

D. The Court Of Appeals' Decision.

The court of appeals rejected the FCC's interpretation of Section 224. The panel majority largely ignored the Commission's statutory analysis of Section 224(b)(1) and (a)(4). Instead, the panel ruled that because subsections (d) and (e) of Section 224 provided specific rules governing the rate mechanism for "'solely cable services'" and "telecommunications service," the Commission could only regulate the "'rates, terms, and conditions'" of pole attachments for those specific purposes. NCTA Pet. App. 25a, 26a. That is, the panel majority believed that "[f]or the FCC to be able to regulate the rent for an attachment that provides Internet service then, Internet service must qualify as either a cable service or a telecommunications service." *Id.* at 26a. Applying that framework, the court of appeals went beyond the questions that the FCC had addressed and decided that Internet service was not a "cable service," *id.* at 26a-29a, and that "there is no statutory basis for the FCC to regulate the Internet as a telecommunications service," *id.* at 29a. As a result, the court of appeals held that "the 1996 Act does not authorize the FCC to regulate pole attachments for Internet service." *Id.*

In reaching that conclusion, the panel majority expressly "decline[d]" "to adopt the D.C. Circuit's reasoning in *Texas Utilities*." NCTA Pet. App. 27a-28a n.32. The majority acknowledged that the D.C. Circuit had "deferred to the FCC's interpretation that co-mingled services were covered by section 224," but stated that it felt "no need to follow the reasoning of *Texas Utilities*" because the D.C. Circuit's decision was issued "before the 1996 amendments [to Section 224] were enacted." *Id.* at 28a n.32. According to the panel majority, the 1996 amendments to Section 224 "eliminate[d] the ambiguity" regarding the Commission's authority

confronted by the D.C. Circuit in *Texas Utilities* by adding a "new section 224(d)(3)" which "states that 'solely cable services' receive regulated rents." *Id.* Therefore, the panel below concluded that it was presented "with an entirely different situation from that faced by the D.C. Circuit in *Texas Utilities*." *Id.*[10]

In dissent, Judge Carnes explained that the "plain language" of Section 224 refuted the panel's conclusion regarding the Commission's authority to regulate attachments by cable operators that provide Internet service. NCTA Pet. App. 33a. Judge Carnes noted that "Section 224(b)(1) provides that the FCC 'shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable.'" *Id.* at 34a. Further, he explained that "[t]he term 'pole attachment' is defined . . . as '*any* attachment by a cable television system,'" *id.*, and that the word "'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind,'" *id.* Judge Carnes employed that commonsense statutory analysis to conclude that "the FCC has the authority to regulate "*all* attachments, i.e., attachments 'of whatever kind.'" *Id.*

In his subsequent statement dissenting from the denial of rehearing en banc, Judge Carnes explained that the issues presented in this case "may affect every person who uses . . . Internet service in this country." NCTA Pet. App. 96a. According to Judge Carnes, "[a] more national case could hardly be imagined." *Id.* Thereafter, the court of appeals granted the motions to stay the mandate pending the filing and resolution of a petition for certiorari. *Id.* at 69a-76a.

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[10] The court of appeals also ruled, based on its prior decision in *Gulf Power Co.* v. *United States*, 187 F.3d 1324, 1338 (11th Cir. 1999), that respondents' facial challenge, under the Fifth Amendment, to the formula adopted by the FCC to provide "just compensation" under Section 224 was "unripe," and therefore the court of appeals did "not address it." NCTA Pet. App. 18a-19a.

SUMMARY OF ARGUMENT

1.A. The plain language of 47 U.S.C. § 224, the background of administrative and judicial decisions against which Congress amended Section 224, and the purposes underlying the 1996 Act, all confirm that a cable system does not forfeit regulatory oversight by the FCC that ensures its nondiscriminatory access to essential bottleneck facilities at "just and reasonable" "rates, terms, and conditions" by providing high-speed Internet access to its customers along the same lines it uses to provide traditional video programming services.

First, Section 224, by its terms, mandates that the Commission ensure "just and reasonable" "rates, terms, and conditions" for "pole attachment[s]," which are defined as "any attachment by a cable television system . . . to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4), (b)(1). This broad language clearly encompasses "pole attachments" used by a cable television system to provide high-speed Internet access as well as traditional video cable programming to its subscribers.

Second, the administrative and judicial interpretations of the language of Section 224(b)(1) and (a)(4) further confirm that conclusion. Congress is presumed to be aware of administrative and judicial interpretation of language in a statute, and to adopt that interpretation when it amends the statute without any relevant change to that language. *E.g.*, *Lorillard* v. *Pons*, 434 U.S. 575, 580-81 (1978). Prior to the 1996 amendments, the law was settled that the FCC had authority under Section 224(b)(1) and (a)(4) to regulate the "rates, terms, and conditions" of pole attachments by cable television systems "'regardless of the type of service provided over the equipment attached to the poles.'" *Texas Utils. Elec. Co.* v. *FCC*, 997 F.2d 925, 927 (D.C. Cir. 1993) (quoting *Heritage Cablevision Assocs.* v. *Texas Utils. Elec. Co.*, 6 FCC Rcd 7099, 7101 (¶ 12) (1991)). In 1996, when it amended

Section 224, Congress adopted those prior interpretations because it left the relevant language of Section 224(b)(1) and (a)(4) entirely unchanged.

Finally, the FCC's interpretation of Section 224 is consistent with and promotes the statutory purposes underlying the 1996 Act. As to Section 224, the 1996 amendments quite clearly were intended to expand, rather than limit, the Commission's authority over the "rates, terms, and conditions" of "pole attachments." Thus, the Commission's general authority was expanded to encompass attachments by "provider[s] of telecommunications service" as well as "cable television system[s]," 47 U.S.C. § 224(a)(4), and the Commission was given the added responsibility to ensure that the "rates, terms, and conditions" of such access were "nondiscriminatory" as well as "just and reasonable." *Id.* § 224(f)(1). More generally, the clear intent of the 1996 Act was to break down artificial barriers to competition put in place by government-granted monopolies, to encourage the development of advanced services such as high-speed Internet access and to promote the Internet and other interactive media. The Commission's interpretation of Section 224 is thus consistent with and compelled by these overarching statutory purposes.

B. The court of appeals' contrary conclusion does not withstand scrutiny. First, its determination that the language of subsections (d) and (e) divested the Commission of its authority under Section 224(b)(1) ignores that these subsections simply ensure that the pre-existing rate structure would continue to apply to cable systems using attachments "solely" to provide cable services, but that cable systems and telecommunications carriers both would be subject to a separate rate structure when they competed for the provision of telecommunications service. Subsections (d) and (e) therefore do not divest the Commission of authority under subsection (b)(1), but instead identify how the Commission is to implement that authority over pole attachment rates in two

specific circumstances. For all other circumstances, the FCC retains authority to regulate pole attachment rates under Section 224(b)(1). In contrast, the court of appeals' reading that the rate structures in (d) and (e) are exclusive renders subsection (b)'s references to "just and reasonable" "rates" entirely superfluous.

Moreover, in holding that the 1996 amendments implicitly repealed pre-1996 law on commingled services, the court of appeals ran afoul of the "cardinal" rule that repeals by implication are disfavored. See *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936). Indeed, Congress would not have repealed the Commission's established authority over the "rates, terms, *and* conditions" of these pole attachments by merely modifying one provision (subsection (d)) and adding another (subsection (e)) that address "rates" only and say nothing about the "terms" or "conditions" of any pole attachments. Finally, the court of appeals' determination that prior administrative and judicial decisions interpreting the scope of the FCC's pole attachment authority were not controlling was itself based upon a misreading of the 1996 amendments to Section 224.

C. But even if there were any ambiguity over whether the FCC could regulate under Section 224 pole attachments used by a cable television system to provide high-speed Internet access services along with traditional video programming services – and there is none – the FCC's conclusion is, at a minimum, a reasonable one. Indeed, the FCC's conclusion that it has such authority is consistent with the plain language of Section 224, respects the prior administrative and judicial interpretations of identical statutory language, and promotes the purposes underlying the 1996 Act. Accordingly, settled law requires deference to the FCC's reasonable conclusion that pole attachments used by cable television systems to provide high-speed Internet access fall within Section 224's protections.

2. Alternatively, even if the Court were to conclude that Section 224 authorized regulation of rates, terms, and conditions of attachments only for "cable service" and "telecommunications service," the decision below should be reversed to allow the Commission to assemble the record necessary to determine, in the first instance, whether Internet access provided by a cable television system is, in fact, a "cable service." That approach properly recognizes that reviewing courts are required to defer to reasonable interpretations of statutes by agencies and that agency decisions should be based upon an adequate factual administrative record. Here, the FCC expressly declined to determine whether Internet service provided by a cable system qualified as cable service. The Commission thus should be permitted to gather the evidence necessary to analyze and determine whether Internet access provided by cable television systems qualifies as "cable service." Indeed, that issue is squarely presented in a separate proceeding currently before the FCC.

ARGUMENT

I. CONGRESS DID NOT INTEND THAT CABLE SYSTEMS WOULD FORFEIT REGULATORY OVERSIGHT THAT ENSURES NONDISCRIMINATORY ACCESS TO POLES AT "JUST AND REASONABLE" "RATES, TERMS, AND CONDITIONS" BY PROVIDING HIGH-SPEED INTERNET ACCESS IN ADDITION TO TRADITIONAL VIDEO PROGRAMMING.

A. The Plain Language Of Section 224, Its Statutory History, And The Purposes Underlying Section 224 And The 1996 Act Confirm That The FCC Has Authority To Regulate The Rates, Terms, And Conditions For Pole Attachments Used By Cable Television Systems To Provide Internet Access Service.

1. This Court explained long ago that "[w]hen there is no ambiguity in the words, there is no room for construction." *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95-96 (1820) (Marshall, C.J.). "The starting point in interpreting a statute is its language, for '[i]f the intent of Congress is clear, that is the end of the matter.'" *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 409 (1993) (quoting *Chevron, U.S.A, Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). Put another way, "[c]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there," for "[w]hen the words of a statute are unambiguous, then this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992) (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)).

The language of Section 224 is clear. It provides that "the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. § 224(b)(1).

Subsection (a)(4), in turn, defines "pole attachment," as "*any* attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." *Id.* § 224(a)(4) (emphasis added). As this Court has explained, "the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New Int'l Dictionary* 97 (1976)). Indeed, in *AT&T Corp.* v. *Iowa Utilities Board*, 525 U.S. 366 (1999), the Court relied upon Congress' use of word "'any'" in 47 U.S.C. § 251(c)(3) to reject a claim that the statutory "duty to provide, to *any* requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis," 47 U.S.C. § 251(c)(3) (emphasis added), should be limited to a subset of requesting carriers that satisfied a separate "facilities-ownership requirement." 525 U.S. at 392.

Based on the plain language of Section 224, the Commission properly declined to limit its authority over "any attachment by a cable television system" to a subset of such attachments used solely to provide video programming, and not Internet access services. Instead, it properly concluded that the "the definition of 'pole attachment' does not turn on what type of service the attachment is used to provide," and therefore "the rates, terms, and conditions for *all* pole attachments by a cable television system are subject to [Section 224]." NCTA Pet. App. 63a (¶ 30) (emphasis added). In short, the plain language of Section 224 is clear, and it fully supports the FCC's conclusion.

2. Further, when it amended Section 224, Congress did not write on a clean slate. That fact is important because "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation of a statute when it reenacts a statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580-81 (1978).

See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 381-82 (1982).[11] This rule of construction "is based upon the theory that the legislature is familiar with the contemporaneous interpretation of a statute, especially when made by an administrative body or executive officers charged with the duty of administering or enforcing that statute," and, therefore, the legislature "impliedly adopts the interpretation upon reenactment." 2B N. Singer, *Sutherland Statutory Construction* § 49.09, at 108 & n.6 (6th ed. 2000) (citing cases). For example, in *Lindahl* v. *Office of Personnel Management*, 470 U.S. 768 (1985), the Court ruled that when Congress "amended" 5 U.S.C. § 8347 "without explicitly repealing" an established legal interpretation of § 8347, that fact "itself g[ave] rise to a presumption that Congress intended to embody [the prior legal interpretation] in the amended version of [the statute]." *Id.* at 782.

These principles apply equally in this case. Prior to Congress' 1996 amendments to Section 224, the law was settled that the "any attachment by a cable television system" language in Section 224(a)(4), "provide[d] that a cable operator may seek Commission-regulated rates for all pole attachments within its system, regardless of the type of service provided over the equipment attached to the poles." *Heritage Cablevision Assocs.* v. *Texas Utils. Elec. Co.*, 6 FCC Rcd 7099, 7101 (¶ 12) (1991) (footnote omitted). Specifically, the FCC, the agency authorized by Congress to implement Section 224, ruled that Section 224(a)(4) and (b)(1) required it to regulate attachments by cable television systems used "to provide nonvideo broadband communications services . . . , including data transmission services." *Id.* at 7100 (¶ 8); see also *WB Cable Assocs.* v. *Florida Power & Light Co.*, 8 FCC Rcd 383, 386 (¶ 21) (1993) (reaffirming FCC's

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[11] *See also Holder* v. *Hall*, 512 U.S. 874, 920 (1994) (Thomas, J., joined by Scalia, J., concurring in judgment) ("[Court] generally will assume that reenactment of specific statutory language is intended to include a 'settled judicial interpretation' of that language").

decision in *Heritage*); *Selkirk Communications, Inc.* v. *Florida Power & Light Co.*, 8 FCC Rcd 387, 390 (¶ 21) (1993) (same). The FCC's interpretation of this language, in turn, was affirmed on appeal by the D.C. Circuit. *Texas Utils. Elec. Co.* v. *FCC*, 997 F.2d 925, 927 (D.C. Cir. 1993).

In 1996, in the face of this settled administrative and judicial precedent interpreting the "any attachment by a cable television system" language in Section 224, Congress re-adopted precisely the same language when it amended Section 224. First, Congress left Section 224(b)(1) entirely unchanged. Moreover, Congress amended Section 224(a)(4) to provide: "The term 'pole attachment' means *any attachment by a cable television system* or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4) (emphasis added). Both the pre- and post-1996 amendment language are identical in all relevant respects. Settled principles of statutory construction thus dictate that Congress intended to adopt the administrative and judicial construction of Section 224 when it amended that section but reenacted precisely the same language that had been conclusively interpreted by the FCC and affirmed by the D.C. Circuit.

To be sure, Congress modified the definition of "pole attachment" to add attachments by a "provider of telecommunications service," as well as "cable television system[s]" which already were covered. *Id.* But that amendment reflects an *expansion* of the scope of Section 224 to encompass yet another category of attachments. It would make no sense to conclude that Congress narrowed the regulatory authority that the FCC admittedly possessed over pole attachments by cable television systems "'regardless of the type of service provided over the equipment attached to the poles,'" *Texas Utils.*, 997 F.2d at 927, by "expand[ing] the scope of the coverage of section 224." H.R. Conf. Rep. No. 104-458, at 206 (1996).

3. Moreover, when construing a statute, this Court looks to "the provisions of the whole law," including "its object and policy." *Dole* v. *United Steelworkers of Am.*, 494 U.S. 26, 35 (1990). The meaning of a statute "is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

Here, Congress' amendments to Section 224 contained in the 1996 Act were intended to expand the scope of Section 224. In addition to expanding the definition of "pole attachment" to encompass "provider[s] of telecommunications service" as well as "cable television system[s]," Congress also expanded the obligations imposed by Section 224 on utilities, requiring that they "provide . . . nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by [them]." 47 U.S.C. § 224(f)(1). The purpose of these amendments plainly is to expand the protections of Section 224 and thus to broaden access to bottleneck facilities necessary for greater competition in the provision of communications services by cable television systems and telecommunications carriers.

As the Commission explained, "[t]he purpose of the amendments to Section 224 made by the 1996 Act was similar to the purpose behind Section 224 when it first was enacted in 1978, *i.e.*, to remedy the inequitable position between pole owners and those seeking pole attachments." NCTA Pet. App. 63a (¶ 31). The nature of that relationship, and the potential for anti-competitive conduct by pole owners "is not altered when the cable operator seeks to provide additional service." *Id.* In fact, the potential for such abuse has increased because, under the 1996 Act, utilities that are required to provide access to poles under Section 224 now may be authorized to compete against cable operators for the provision of Internet service. 15 U.S.C. § 79z-5c. As the FCC has explained, "[a] growing number of public utilities"

are competing directly with cable operators in the market for Internet services. *Section 706 Report*, 14 FCC Rcd at 2427 (¶ 55).

More generally, the 1996 Act, of which the amendments to Section 224 were but a part, was designed to foster competition among communications service providers by reducing the restraints imposed by government-granted incumbent monopolies. Under the 1996 Act, monopoly state telephone franchises were preempted, 47 U.S.C. § 253, incumbent local exchange carriers ("LECs") were required to share their networks with competitors, *id.* § 251(c)(3), local franchising authorities were limited in their ability to restrict local competition, *id.* § 541(b)(3)(B), and public utilities were freed of legal restrictions that prevented diversification into telecommunications, 15 U.S.C. § 79z-5c. As a result of the 1996 Act, "States may no longer enforce laws that impede competition, and incumbent LECs are subject to a host of duties intended to facilitate market entry." *Iowa Utils. Bd.*, 525 U.S. at 371.

Apart from promoting competition by lowering legal and economic barriers to market entry and ensuring access to bottleneck monopoly facilities, the 1996 Act also expressed a national policy "to promote the continued development of the Internet." 47 U.S.C. § 230(b)(1). In Section 706 of the 1996 Act, Congress authorized the Commission, if it concludes that advanced telecommunications capability is not being deployed in a reasonable and timely manner, to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market." *Id.* § 157, statutory note (b).

In light of these provisions, it strains credulity to suggest that Congress simultaneously intended to limit the Commission's authority under Section 224 and thereby penalize "cable entities that choose to expand their services in a way that w[ould] contribute 'to promot[ing] competition in

every sector of the communications industry,' as Congress intended in the 1996 Act." NCTA Pet. App. 63a-64a (¶ 31) (second alteration in original). This is particularly true because the bottleneck control over essential facilities possessed by utilities is in no way altered "when the cable operator seeks to provide additional service." *Id.* at 63a (¶ 31).

B. The Court Of Appeals' Ruling Is Based On A Misreading Of Section 224 That Violates Settled Canons Of Statutory Construction.

The court of appeals' decision largely ignores these principles. Instead, it focuses solely on subsections (d) and (e), and concludes that the "language of subsections (d) and (e) directs the FCC to establish two specific just and reasonable rates, one for cable television systems providing solely cable service and one for telecommunications carriers providing telecommunications service; no other rates are authorized." NCTA Pet. App. 25a n.29. That conclusion does not withstand scrutiny.

1. As described previously, the plain language of Section 224 refutes the court of appeals' conclusion that Section 224 authorizes only "[i] one [rate] for cable television systems providing solely cable service and [ii] one for telecommunications carriers providing telecommunications service." NCTA Pet. App. 25a n.29. Subsection (b) of Section 224 provides, as it did prior to the 1996 amendments, that "the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. § 224(b)(1). Subsections (d) and (e) merely define "just and reasonable" rates in two specific circumstances: (i) when a cable television system uses an attachment "solely to provide cable service," *id.* § 224(d)(3), and (ii) when a telecommunications carrier uses an attachment "to provide telecommunications services." *id.* § (e)(1).

Subsections (d) and (e) do not reveal any congressional intent to remove attachments that cable operators use to provide Internet access service from the purview of Section 224(b), even if Internet access is neither a cable service nor a telecommunications service. Rather, taken together, they establish a level playing field for the provision of "telecommunications service" by cable systems and telecommunications providers. Thus, "to the extent that a company seeks pole attachment for a wire used solely to provide cable television services . . . , that cable company will continue to pay the rate authorized under current law . . . . If, however, a cable television system also provides telecommunications services, then that company shall instead pay the pole attachment rate prescribed by the Commission pursuant to the fully allocated cost formula." S. Conf. Rep. No. 104-230, at 206.

Simply put, when Congress dictated the mechanism that the Commission should employ when setting rates under two specific circumstances, Congress did not, by negative implication, divest the Commission of its established authority to ensure "just and reasonable" "rates, terms, and conditions" for pole attachments by cable operators that provide both traditional cable video service and Internet service. Indeed, the court of appeals never suggests any plausible reason that Congress would have intended to dissuade cable entities from expanding their services to include high-speed Internet access services. But that is precisely the effect of the court of appeals' decision that cable operators forfeit valuable regulatory protections under Section 224 if they provide Internet service to their subscribers.

Moreover, the court of appeals' conclusion that the specific provisions of subsections (d) and (e) divested the Commission of general authority under subsection (b)(1) is virtually identical to an argument rejected by this Court in *Iowa Utils. Bd.*, 525 U.S. at 380-83 & nn.8, 9. There, the Court held that the scope of the FCC's existing general rulemaking authority

under 47 U.S.C. § 201(b) was not limited by the 1996 Act, which added further provisions in 47 U.S.C. § 251 that "refer[red] to the exercise of [rulemaking] authority conferred elsewhere" or established additional constraints on the FCC's exercise of that general rulemaking authority. *Iowa Utilities Bd.*, 525 U.S. at 383 nn.8, 9. The Court explained that the specific provisions in newly enacted Section 251 did not limit the FCC's established rulemaking authority under Section 201(b), especially since the specific grants of authority were "not redundant of § 201(b)." *Id.*[12] Here too, the Commission's general authority under subsection (b)(1) has not been repealed by Congress' provisions addressing how the Commission should exercise that authority over pole attachment rates in two specific circumstances.

Further, the court of appeals' analysis is entirely backwards because it presumes that the 1996 Act sought to *limit* the scope of the regulatory protections provided by Section 224. According to the panel majority, when Congress dictated the rate mechanism that the Commission should apply for a "cable television system solely to provide cable service," 47 U.S.C. § 224(d)(3), and "telecommunications carriers to provide telecommunications service," *id.* § 224(e)(1), Congress thereby stripped the Commission of all authority to regulate the "rates, terms, and conditions" for pole attachments under any other circumstances. NCTA Pet. App. 26a, 29a.

In fact, the 1996 Act *expanded* the reach of Section 224 by extending the protections previously accorded only to "cable television system[s]" to "provider[s] of telecommunications

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[12] Although the principal dissent disagreed on this point, it relied primarily on its conclusion that Section 201(b) was not, contrary to the majority holding, a general grant of rulemaking authority, but rather was limited to authorizing rules relating to interstate service only. *See* 525 U.S. at 404, 407-09 (Thomas, J., dissenting). Here, by contrast, there can be no dispute regarding the breadth of the language in Section 224(b)(1) and (a)(4).

service" as well. 47 U.S.C. § 224(a)(4). Indeed, even apart from the language of the 1996 amendments, the court of appeals' conclusion also cannot be reconciled with the 1996 Act, whose manifest goal is to eliminate the ability of entities to exercise monopoly control over essential bottleneck facilities that create barriers to competition for communications services. Of course, when construing a statute, this Court considers "the provisions of the whole law" including "its object and policy." *Dole*, 494 U.S. at 35. The object and policy of the 1996 Act refute the notion that Congress sought to limit the FCC's authority over pole attachments by cable television systems.

Finally, the court of appeals' insistence that, apart from the two rates identified in subsections (d) and (e), "no other rates are authorized," NCTA Pet. App. 25a n.29, also should be rejected because it renders a portion of subsection (b)(1) redundant. That is, if the only allowable pole attachment rates are set forth in subsections (d) and (e), then it adds nothing to provide in subsection (b) that pole attachment "rates" must be "just and reasonable." See *Bennett* v. *Spear*, 520 U.S. 154, 173 (1997) (noting that interpretation should "'give effect, if possible, to every clause and word of a statute"). In contrast, the FCC's construction of Section 224 gives meaning both to the specific commands in subsections (d) and (e) as well as the general command to ensure that all attachment rates are "just and reasonable."

2. The court of appeals' interpretation also is mistaken because it fails to consider the presumption against implied repeals. Specifically, the court of appeals recognized that, prior to the 1996 amendments, Section 224 (as interpreted by the FCC and affirmed by the D.C. Circuit) authorized the regulation of pole attachments used by cable systems regardless of the service being provided. NCTA Pet. App. 27a-28a n.32. The court of appeals, however, failed to consider the effect that settled practice had on its conclusion that Congress had implicitly repealed existing practice and

had limited the Commission's authority to only the specific circumstances identified in subsections (d) and (e).

The law is clear that "repeals by implication are not favored," *Rodriguez* v. *United States*, 480 U.S. 522, 524 (1987) (per curiam), and a party advocating such a repeal "bears a heavy burden of persuasion." *Amell* v. *United States*, 384 U.S. 158, 165 (1966); 1A N. Singer, *Sutherland Statutory Construction* § 23.10, at 353 (5th ed. 1991) ("Courts have created a presumption against the repeal of prior laws by implication"); *accord Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936). The purpose of this rule of construction "is to give harmonious effect to all acts on a subject where reasonably possible." 1A N. Singer, *Sutherland Statutory Construction* § 23.10, at 353.

The Court's analysis in *Posadas* v. *National City Bank* is instructive. There, the Court considered the legality of taxes imposed by the Philippine Government on bank branches established by National City Bank in the Philippine Islands under Section 25 of the Federal Reserve Act of 1913 ("Section 25"). 296 U.S. at 498-99. Section 25 authorized the establishment of branches "in foreign countries or dependencies of the United States." *Id.* at 500. The Court explained that "without regard to later legislation," the taxes "imposed by the Philippine Government [were] invalid" under Section 25 of the 1913 Act. *Id.* Posadas, however, argued that "subsequent legislation ha[d] the effect of repealing and abrogating Section 25 of the 1913 act." *Id.* at 501. Specifically, Posadas insisted that a 1916 Act of Congress that amended Section 25 by adding "the words 'or insular possessions' after the word 'dependencies'" effected an implied repeal of Section 25's established legal meaning. *Id.*

In rejecting the argument that the settled meaning of Section 25 had been implicitly repealed by a 1916 amendment to Section 25, the *Posadas* Court relied upon the "cardinal rule . . . that repeals by implication are not favored."

Id. at 503. Under that rule, "'[w]here the powers or directions under several acts are such as may well subsist together, an implication of repeal cannot be allowed.'" *Id.* at 504. Accordingly, implied repeals must be "clear and manifest," and the "implication" of repeal "must be a necessary implication." *Id.* Applying those standards, the Court held that "nothing" "justifies the conclusion that by the amendment of 1916[,] Congress intended to repeal the old § 25 of the Federal Reserve Act." *Id.* at 505.

Here too, nothing in the 1996 amendments to Section 224 justifies the conclusion that Congress sought to repudiate or limit established practice. In 1978, Congress enacted the Pole Attachment Act to provide the FCC, in Section 224(b)(1), with authority to regulate "the rates, terms, and conditions for pole attachments to provide that [they] are just and reasonable." 47 U.S.C. § 224(b)(1). In turn, the 1978 Act defined "pole attachment" in subsection (a)(4) to mean "any attachment by a cable television system." *Id.* § 224(a)(4). Through rulemaking and adjudication, these provisions acquired a settled legal meaning wherein the Commission was authorized to regulate pole attachments by a cable operator "'regardless of the type of service provided over the equipment attached to the poles.'" *Texas Utils.*, 997 F.2d at 927 (quoting *Heritage*, 6 FCC Rcd at 7101 (¶ 12)).

Subsequently, Congress passed the 1996 Act, which amended portions of Section 224. In the 1996 Act, Congress included no language expressly repealing the subsections of Section 224 that defined the Commission's authority over pole attachments in subsection (b)(1) or the term "pole attachment" in subsection (a)(4). Moreover, the only change that Congress made to either of these provisions is that it expanded the definition of "pole attachment" so that it would include "providers of telecommunications service" as well as the "cable television systems" previously covered under the 1978 Act. As in *Posadas*, there quite simply is no "clear and manifest" intent or "necessary implication" that Congress

intended to repeal the prior understanding of the scope of the Commission's authority to regulate the "rates, terms, and conditions" of pole attachments under Section 224(b)(1).

In addition, the manner in which Congress amended Section 224 makes it especially unlikely that Congress intended to repeal and limit the Commission's existing regulatory authority over pole attachments by cable television systems. The FCC's authority under Section 224(b)(1) is not limited to "rates," but also extends to the "terms, and conditions" of pole attachments. According to the court of appeals, however, Congress implicitly repealed the Commission's authority over the "rates, terms, and conditions" of these pole attachments by modifying subsection (d) and adding subsection (e), two provisions that relate solely to pole attachment *rates* and say nothing about "terms" or "conditions." If Congress had intended to repeal the FCC's established authority over the "rates, terms, and conditions" of pole attachments, it would not have done so by merely adding language that has nothing to do with the "terms" or "conditions" of pole attachments.

3. Finally, the court of appeals' conclusion that the 1996 amendments to Section 224 repudiated settled practice as reflected in the D.C. Circuit's *Texas Utilities* ruling was based upon a misreading of the 1996 amendments to Section 224. According to the court of appeals, "new section 224(d)(3) states that 'solely cable services' receive regulated rents." NCTA Pet. App. 28a n.32. Based on that reading, the court of appeals insisted that "Congress, in 1996, amended [Section 224] to eliminate the ambiguity" confronted by the D.C. Circuit in *Texas Utilities*, and therefore it was "faced with an entirely different situation from that faced by the D.C. Circuit." NCTA Pet. App. 28a n.32.

Contrary to the court of appeals' decision, however, the "new section 224(d)(3)" does *not* state that "solely cable services" will receive regulated rents. Rather, Section 224(d)(3) provides that "any pole attachment used by a cable

television system solely to provide cable service" will be governed by the rate structure set forth in Section 224(d). 47 U.S.C. § 224(d)(3). Similarly, Section 224(e)(1) provides that pole attachments "used by telecommunications carriers to provide telecommunications services" are governed by the rate formula set forth in subsection (e). *Id.* § 224(e)(1). As demonstrated above, these new provisions do not divest the FCC of regulatory authority over "rates, terms, and conditions" of pole attachments in all other circumstances. *Id.* § 224(b)(1). Congress' use of the word "solely" in subsection (d) simply distinguishes the rates applicable to attachments by cable systems used to provide "solely" cable service from the rates in subsection (e) for attachments used to provide "telecommunications" service.

Nothing in the 1996 amendments either expressly or implicitly limits the prior scope of Section 224, which grants the FCC authority under subsection (b)(1) to ensure "just and reasonable" "rates, terms, and conditions" of "pole attachment[s]," and which still defines "pole attachment" in subsection (a)(4) to mean "any attachment by a cable television system . . . to a pole . . . owned or controlled by a utility." 47 U.S.C. § 224(a)(4), (b)(1). The relevant language of Section 224, as amended by the 1996 Act, is exactly the same language interpreted by the FCC in *Heritage* and affirmed by the D.C. Circuit in *Texas Utilities*. It should have been interpreted in the same way by the court of appeals.

C. Even If The Scope Of The Commission's Authority Under Section 224 Were Ambiguous, Then The Commission's Reasonable Interpretation Must Prevail.

Although the 1996 Act "profoundly affects a crucial segment of the economy worth tens of billions of dollars," *Iowa Utils. Bd.*, 525 U.S. at 371, it is "in many important respects" "a model of ambiguity," *id.* at 397. In such cases, "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing

agency." *Id.*; see also *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). As demonstrated in Parts I.A. and I.B., *supra*, in the 1996 amendments to Section 224, Congress intended to *expand* the scope of the FCC's existing authority to regulate the "rates, terms, and conditions" of pole attachments. But even if the effect of the 1996 amendments on Section 224 rendered the scope of the Commission's authority ambiguous on this point, then under *Chevron*, the FCC's reasonable interpretation must still prevail.

Chevron provides that if "Congress has not addressed the precise question at issue, the Court does not simply impose its own construction." 467 U.S. at 843. Rather, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*; see also 1 K. Davis & R. Pierce, Jr., *Administrative Law Treatise* § 3.3, at 113 (3d ed. 1994) ("[P]olicy disputes within the scope of authority Congress has delegated an agency are to be resolved by agencies rather than by courts").

In Section 224, Congress provided that "[t]he Commission shall prescribe by rule regulations to carry out the provisions of this section." 47 U.S.C. § 224(b)(2). In carrying out that obligation, the Commission concluded that pole attachments used by a cable television system to provide high-speed Internet access fall within the scope of the Commission's authority to regulate the "rates, terms, and conditions" of "any attachment by a cable television system." The FCC's conclusion (i) is faithful to the statutory language of Section 224(b)(1) and 224(a)(4); (ii) properly incorporates the settled legal meaning of Section 224; and (iii) is consistent with Congress' express goals of expanding the scope of Section 224, promoting competition in the communications industry generally, and ensuring the availability of advanced services such as high-speed Internet access. At the very minimum, the Commission has reached a reasonable interpretation of the

scope of Section 224 that is entitled to deference under *Chevron*.

II. EVEN IF THE COURT CONCLUDES THAT ONLY ATTACHMENTS USED EXCLUSIVELY TO PROVIDE CABLE SERVICES AND TELECOMMUNICATIONS SERVICES ARE PROTECTED BY SECTION 224, IT NEVERTHELESS SHOULD REVERSE THE DECISION BELOW TO ALLOW THE FCC TO DETERMINE WHETHER INTERNET ACCESS PROVIDED BY A CABLE TELEVISION SYSTEM IS A CABLE SERVICE.

As demonstrated above, Section 224 is properly read to provide the FCC with jurisdiction over pole attachments by cable television systems used to provide high-speed Internet access services. If this Court should determine, however, that the court of appeals was correct in concluding that Section 224 authorizes regulation of pole attachments by cable television systems only when such attachments are used to provide "cable service" or "telecommunications service," its judgment nevertheless should be reversed so that the FCC may make the determination – that it expressly declined to make previously, NCTA Pet. App. 66a (¶ 34) – of whether high-speed Internet access service provided by a cable system is a "cable service."

Where Congress has entrusted the implementation and construction of federal law to an administrative agency, federal courts are precluded from substituting their own judgment for that of the expert agency. *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Of course, an agency's implementation and construction of a statute must be informed by an adequate administrative record. Indeed, this Court has "consistently expressed the view that ordinarily review of administrative decisions is to be confined to 'consideration of the decision . . . and of the evidence on which it was based.'" *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (quoting

Camp v. *Pitts*, 411 U.S. 138, 142 (1973)). As a result, "[i]f the decision of the agency is not sustainable on the administrative record made, then the decision must be vacated and the matter remanded . . . for further consideration." *Id.* (omission in original).

These principles apply equally to this case. In its Order, the Commission made clear its view that it "need not decide . . . the precise category into which Internet services fit," because "[s]uch a decision is not necessary in order to determine the pole attachment rate applicable to cable television systems using pole attachments to provide traditional cable services and Internet services." NCTA Pet. App. 66a (¶ 34). As a result, the FCC did not assemble the necessary evidentiary record to determine precisely the nature of Internet services provided by cable television systems. Nor did the agency address and resolve arguments regarding the proper characterization of Internet service provided by a cable television system. *Id.*

Unfortunately, the absence of a complete record describing the contours of Internet access services provided by cable systems did not dissuade the court of appeals from resolving this issue on its own. See NCTA Pet. App. 26a-28a. Indeed, the court of appeals concluded that Internet access services were neither cable service nor telecommunications service. *Id.* at 29a. In doing so, the court of appeals, in the absence of any factual record on the point, improperly substituted its own judgment for that of the agency chosen by Congress to implement Section 224. *Id.* The proper course for the court of appeals should have been to remand the case back to the FCC for further proceedings to resolve this separate issue. See, *e.g.*, *Whitman* v. *American Trucking Ass'ns*, 121 S. Ct. 903, 919 (2001) (rejecting EPA implementation of policy as unreasonable but leaving "it to the EPA to develop a reasonable interpretation").

To the extent that the Court concludes that the FCC's construction of Section 224 is unreasonable, the decision

below nevertheless should be reversed to allow the Commission to assemble an adequate record and consider the arguments that are necessary for it to properly exercise its expert judgment in resolving whether Internet access services provided by a cable television system qualify as "cable service." Simply put, if the question is relevant to this case, the Commission should be permitted to resolve the proper regulatory category for high-speed Internet access services provided by cable television systems in the first instance.[13]

---

[13] That process currently is underway in a separate proceeding in which the Commission has sought factual input that may affect policy concerns relating to high-speed Internet access using cable modem technology. *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, FCC No. 00-355, slip op. ¶¶ 14-24 (FCC Sept. 28, 2000). Indeed, respondents noted previously that "the proper regulatory classification of Internet service 'is central to a separate debate concerning whether a cable operator can be compelled to provide unaffiliated Internet service providers with "open access" to its cable facilities.'" Opposition Br. at 13 (quoting Gov't Pet. at 15 n.4).

CONCLUSION

For these reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

47 U.S.C. § 224. Pole attachments

(a) Definitions

As used in this section:

(1) The term "utility" means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

(2) The term "Federal Government" means the Government of the United States or any agency or instrumentality thereof.

(3) The term "State" means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

(4) The term "pole attachment" means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

(5) For purposes of this section, the term "telecommunications carrier" (as defined in section 153 of this title) does not include any incumbent local exchange carrier as defined in section 251(h) of this title.

(b) Authority of Commission to regulate rates, terms, and conditions; enforcement powers; promulgation of regulations

(1) Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312(b) of this title.

(2) The Commission shall prescribe by rule regulations to carry out the provisions of this section.

(c) State regulatory authority over rates, terms, and conditions; preemption; certification; circumstances constituting State regulation

(1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f) of this section, for pole attachments in any case where such matters are regulated by a State.

(2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that—

(A) it regulates such rates, terms, and conditions; and

(B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments as well as the interests of the consumers of the utility services.

(3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments—

(A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments; and

(B) with respect to any individual matter, unless the State takes final action on a complaint regarding such matter—

(i) within 180 days after the complaint is filed with the State, or

(ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

(d) Determination of just and reasonable rates; "usable space" defined

(1) For purposes of subsection (b) of this section, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

(2) As used in this subsection, the term "usable space" means the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment.

(3) This subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service. Until the effective date of the regulations required under subsection (e) of this section, this subsection shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide any telecommunications service.

(e) Regulations governing charges; apportionment of costs of providing space

(1) The Commission shall, no later than 2 years after February 8, 1996, prescribe regulations in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges. Such regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.

(2) A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

(3) A utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity.

(4) The regulations required under paragraph (1) shall become effective 5 years after February 8, 1996. Any increase in the rates for pole attachments that result from the adoption of the regulations required by this

subsection shall be phased in equal annual increments over a period of 5 years beginning on the effective date of such regulations.

(f) Nondiscriminatory access

(1) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.

(2) Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

(g) Imputation to costs of pole attachment rate

A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.

(h) Modification or alteration of pole, duct, conduit, or right-of-way

Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.

(i) Costs of rearranging or replacing attachment

An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way).

(June 19, 1934, c. 652, Title II, § 224, as added Feb. 21, 1978, Pub.L. 95-234, § 6, 92 Stat. 35 and amended Sept. 13, 1982, Pub. L. 97-259, Title I, § 106, 96 Stat. 1091; Oct. 30, 1984, Pub.L. 98-549, § 4, 98 Stat. 2801; Oct. 25, 1994, Pub.L. 103-414, Title III, § 304(a)(7), 108 Stat. 4297; Feb. 8, 1996, Pub.L. 104-104, Title VII, § 703, 110 Stat. 149.)

47 U.S.C. § 157. New technologies and services

* * * *

HISTORICAL AND STATUTORY NOTES

* * * *

Advanced Telecommunications Incentives

Pub.L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, provided that:

"(a) In general.—The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

"(b) Inquiry.—The Commission shall, within 30 months after the date of enactment of this Act [Feb. 8, 1996], and regularly thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

"(c) Definitions.—For purposes of this subsection:

"(1) Advanced telecommunications capability.—The term 'advanced telecommunications capability' is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

"(2) Elementary and secondary schools.—The term 'elementary and secondary schools' means elementary and secondary schools, as defined in paragraphs (14) and (25), respectively, of section 14101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801) [section 8801(14) and (25) of Title 20, Education]."

47 U.S.C. § 230. Protection for private blocking and screening of offensive material

* * * *

(b) Policy

It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

* * * *

(June 19, 1934, c. 652, Title II, § 230, as added Pub.L. 104-104, Title V, § 509, Feb. 8, 1996, 110 Stat. 137; Pub.L. 105-277, Div. C, Title XIV, § 1404(a), Oct. 21, 1998, 112 Stat. 2681-739.)

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Nos. 00-832 and 00-843

In the Supreme Court of the United States

NATIONAL CABLE TELEVISION ASSOCIATION, PETITIONER

v.

GULF POWER COMPANY, ET AL.

FEDERAL COMMUNICATION COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

GULF POWER COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

Certain provisions of the Pole Attachments Act, 47 U.S.C. 224 (1994 & Supp. IV 1998), direct the Federal Communications Commission to set "just and reasonable" rates, 47 U.S.C. 224(b)(1), that a utility may charge for "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility," 47 U.S.C. 224(a)(4) (1994 & Supp. IV 1998). The questions presented are:

1. Whether those provisions of the Pole Attachments Act apply to attachments by cable television systems that are simultaneously used to provide high-speed Internet access and conventional cable television programming.

2. Whether those provisions of the Pole Attachments Act apply to attachments by providers of wireless telecommunications services no less than to attachments by providers of wireline telecommunications services.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the parties to the proceeding in the court of appeals were Alabama Power Company, Georgia Power Company, Southern Company Services, Tampa Electric Company, Potomac Electric Power Company, Virginia Electric & Power Company, Carolina Power & Light Company, Duquesne Light Company, Delmarva Power & Light Company, Public Service Electric & Gas Company, Houston Lighting & Power Company, Texas Utilities Electric Company, American Electric Power Service Corporation, Commonwealth Edison Company, Duke Energy Corporation, Union Electric Company, Florida Power and Light Company, the National Cable Television Association, MCI Telecommunications Corporation, U S WEST, Inc., Bell South Corporation, A T & T Corporation, SBC Communications, Inc., Pacific Bell, Nevada Bell, Southwestern Bell Telephone Company, GTE Service Corporation, Pennsylvania Cable & Telecommunications Association, Arizona Cable Telecommunications Association, and Ameritech Corporation.

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In the Supreme Court of the United States

No. 00-832

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v.

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FEDERAL COMMUNICATION COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

GULF POWER COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a[1]) is reported at 208 F.3d 1263, and the order denying rehearing en banc (Pet. App. 42a-55a) is reported at 226 F.3d 1220. The principal order of the Federal Communications Commission (FCC), *In re Implementation of Section 703(e) of the Telecommunications Act of 1996:*

[1] "Pet. App." references in this brief are to the appendix to the petition for a writ certiorari in No. 00-843.

Amendment of the Commission's Rules and Policies Governing Pole Attachments, is reported at 13 F.C.C.R. 6777 (1998) and is reprinted in Pet. App. 56a-204a.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 2000. A petition for rehearing was denied on September 12, 2000 (Pet. App. 55a). The petition for a writ of certiorari in No. 00-843 was filed on November 21, 2000. The petition for a writ of certiorari in No. 00-832 was filed on November 22, 2000. The Court granted the petitions for a writ of certiorari and consolidated the two cases on January 22, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Pole Attachments Act, 47 U.S.C. 224 (1994 & Supp. IV 1998), is set forth at Pet. App. 205a-211a.

STATEMENT

1. Since the inception of cable television, cable operators have leased space on telephone or electric utility poles, or in underground utility conduits, for the attachment of cable distribution facilities, such as coaxial or fiber-optic cable and associated equipment. Pet. App. 5a; S. Rep. No. 580, 95th Cong., 1st Sess. 15 (1977). Constraints imposed by "zoning restrictions, environmental regulations, and start-up costs have rendered other options infeasible." Pet. App. 5a. The "monopoly" enjoyed by the power and telephone companies on poles and conduits "that could accommodate television cables has allowed them, in the past, to charge monopoly rents." *Ibid.* See generally *FCC* v. *Florida Power Corp.*, 480 U.S. 245 (1987).

To address that problem, Congress in 1978 enacted the Pole Attachments Act, Pub. L. No. 95-234, § 6, 92 Stat. 35 (47 U.S.C. 224 (1994 & Supp. IV 1998)). Then as now, the Act required the FCC to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. 224(b)(1). A "pole attachment" was defined as "any attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. 224(a)(4); see generally S. Rep. No. 580, *supra*. The FCC interpreted that provision to require it to ensure "just and reasonable" rates for all of a cable company's attachments, "regardless of the type of service provided over the equipment attached to the poles," and even if the attachments are used for "both traditional (*i.e.*, video) and nontraditional (*i.e.*, data) services on a 'commingled' basis." *Texas Utils. Elec. Co.* v. *FCC*, 997 F.2d 925, 927, 929 (D.C. Cir. 1993) (approving FCC interpretation).

2. The Pole Attachments Act was amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, which comprehensively revised the structure of regulation for the entire communications industry. Among the changes made by the Telecommunications Act were the following:

First, the 1996 amendments made the protections of the Pole Attachments Act available to certain entities beyond cable television operators. They accomplished that end by expanding the definition of the term "pole attachment" in Section 224 from "any attachment by a cable television system" to "any attachment by a cable television system *or provider of telecommunications service*." 47 U.S.C. 224(a)(4) (1994 & Supp. IV 1998) (emphasis added). Such "telecommunications service"

is in turn defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. 153(46) (Supp. IV 1998). See also p. 8 n.4, *infra* (statutory definitions of "telecommunications" and "telecommunications carrier").

Second, the 1996 amendments altered the specification of pole attachment rates that are applicable in particular contexts under the Act. Before 1996, Section 224(d) had set forth a particular formula for determining "just and reasonable" rates. In 1996, Congress provided that that formula "shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service." 47 U.S.C. 224(d)(3) (Supp. IV 1998). Congress also provided that the Commission "shall * * * prescribe regulations in accordance with" a somewhat different formula "to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services." 47 U.S.C. 224(e)(1) (Supp. IV 1998).[2]

3. The FCC implemented the amendments to the Pole Attachments Act in *In re Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 F.C.C.R. 6777 (1998), see Pet. App. 56a-204a. As pertinent here, the Commission determined that the protections of Section 224

[2] In an additional significant change, the 1996 amendments added a new Section 224(f). That provision does not address rates, but instead provides that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. 224(f)(1) (Supp. IV 1998).

continue to cover attachments used simultaneously for providing data services and traditional cable television service. *Id.* at 85a-89a. Such data services increasingly include "cable modem" service: the use of cable facilities—including the same wires over which conventional cable television signals are transmitted—to provide "broadband" (high-speed) Internet access to consumers. That technology "allows users to access the Internet at speeds fifty to several hundred times faster than those available through conventional computer modems connected to what is commonly referenced in the telecommunications industry as 'plain old telephone service.'" *AT&T* v. *City of Portland*, 216 F.3d 871, 873-874 (9th Cir. 2000). The Commission based its conclusion that the Act governed attachments used simultaneously to provide cable television and Internet access on the ground that it "is still obligated under Section 224(b)(1) to ensure that the 'rates, terms and conditions [for pole attachments] are just and reasonable,' and, as Section 224(a)(4) states, a pole attachment includes '*any* attachments by a cable television system.'" Pet. App. 90a (emphasis added). The Commission noted that that conclusion would remain valid regardless of whether a cable television system providing commingled Internet access is considered to be providing "cable service," "telecommunications service," or some other form of service. *Id.* at 89a-90a.[3] Finally, the Commission determined that the 1996

[3] Indeed, because the classification of cable Internet access as "cable service," "telecommunications service," or some other form of service is the subject of ongoing proceedings before the Commission concerning issues outside the Pole Attachments Act, the Commission expressly stated that it "d[id] not intend * * * to foreclose any aspect of the Commission's ongoing examination of those issues." Pet. App. 89a; see pp. 29-31, *infra*.

amendments extend the protections of Section 224 to wireless carriers no less than to other telecommunications carriers. *Id.* at 91a-96a.

4. A number of electric utility companies filed petitions for review of the FCC's order in the Third, Fourth, Sixth, Eighth, Eleventh, and D.C. Circuits. Pet. App. 14a-15a. Pursuant to the FCC's motion, the cases were consolidated in the Eleventh Circuit. *Id.* at 15a. In a ruling not at issue before this Court, a panel of the court of appeals unanimously held that challenges to various aspects of the FCC's orders under the Takings Clause were not ripe. *Id.* at 18a-19a. See also *id.* at 32a-35a (rejecting challenge to an additional portion of FCC Order). In the rulings that are at issue in this Court, however, the court of appeals panel divided. The majority reversed the FCC's conclusions that the Pole Attachments Act, as amended in 1996, authorizes it to regulate pole attachments by cable operators that supply Internet access as well as cable television service over their wires, *id.* at 26a-32a, and that the Commission has no less authority to regulate pole attachments to provide wireless telecommunications services than pole attachments to provide wireline telecommunications services, *id.* at 20a-26a.

a. The court of appeals rejected the FCC's conclusion "that Internet service provided by a cable television system * * * is subject to regulation under section 224(b)(1)'s mandate to 'ensure that the rates, terms, and conditions [for pole attachments] are just and reasonable.'" Pet. App. 26a. Although the court briefly adverted to the definition of "pole attachment" in Section 224(a)(4) of the pre-1996 Pole Attachments Act as "any attachment by a cable television system," see *id.* at 30a n.32, the court did not address the fact that that definition continues to define the pole

attachments subject to the post-1996 Act. Instead, the court noted the separate provisions of the amended Act that "call[] for the Commission to establish two rates for pole attachments." *Id.* at 27a. One of those provisions "applies to 'any pole attachment used by a cable television system solely to provide cable service.'" *Ibid.* (quoting 47 U.S.C. 224(d)(3) (Supp. IV 1998)). The other "applies to 'charges for pole attachments used by telecommunications carriers to provide telecommunications services.'" *Ibid.* (quoting 47 U.S.C. 224(e)(1) (Supp. IV 1998)). In the court's view, "[f]or the FCC to be able to regulate the rent for an attachment that provides Internet service then, Internet service must qualify as either a cable service or a telecommunications service." *Ibid.* Notwithstanding that the FCC had expressly declined to rule on the correct categorization of Internet access provided through cable modems, see pp. 29-30, *supra*, the court concluded that such Internet access is neither cable service, Pet. App. 27a-31a, nor telecommunications service, *id.* at 31a, and that the FCC therefore has no authority to regulate rates for pole attachments by cable operators that carry both cable television and Internet access through the same wires. See *id.* at 31a-32a, 30a n.32.

b. With respect to wireless telecommunications service, the amended Pole Attachments Act, as noted above, provides that the FCC shall ensure "just and reasonable" "rates, terms, and conditions" for "pole attachments," 47 U.S.C. 224(b)(1), and it defines "pole attachment" to mean "any attachment by a cable television system *or provider of telecommunications service* to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. 224(a)(4) (1994 & Supp. IV 1998) (emphasis added). Other subsections of the Act provide, *inter alia*, that the Commission "shall

* * * prescribe regulations" based on specified cost-apportionment formulas "to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services," 47 U.S.C. 224(e)(1) (Supp. IV 1998), and that "[a] utility shall provide * * * any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it," 47 U.S.C. 224(f)(1) (Supp. IV 1998).[4]

The court of appeals rejected the FCC's position, see Pet. App. 91a-96a, that an attachment by a wireless telecommunications provider, no less than an attachment by a wireline provider, is an "attachment by a * * * provider of telecommunications service" within the meaning of the Act. The court stated:

> Section 224(a)(4) defines a pole attachment as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." A utility, according to section 224(a)(1) is "any person . . . who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." Read in combination, these two provisions give the FCC authority to regulate attachments to poles used, at least in part, for *wire* communications, and by negative implication does not give the FCC authority over attachments to poles for *wireless* communications.

[4] For purposes of the Pole Attachments Act, as well as other provisions of Title 47, the term "'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing." 47 U.S.C. 153(43) (Supp. IV 1998). In turn, "'telecommunications carrier' means any provider of telecommunications services," 47 U.S.C. 153(44) (Supp. IV 1998), and the term "'telecommunications service' means the offering of telecommunications for a fee directly to the public * * *, regardless of the facilities used," 47 U.S.C. 153(46) (Supp. IV 1998).

Id. at 21a-22a (footnotes omitted). In the court's view, "[t]he statutory language of section 224 itself prohibits the FCC from regulating pole attachments for wireless communications; thus, we may end our review with that language." *Id.* at 22a n.25.

The court added that the "original purpose behind regulating utility poles" was "to prevent the telephone and power companies from charging monopoly rents to connect to their bottleneck facilities." Pet. App. 24a (footnote omitted). The court stated that the utilities' "poles are not bottleneck facilities for wireless systems," since their attachments could be placed "on any tall building," and wireless networks may "continue working if one antenna malfunctions." *Id.* at 25a. The court concluded that, because "utility poles are not bottleneck facilities for wireless systems," and "because the 1996 Act deals with wire and cable attachments to bottleneck facilities, the act does not provide the FCC with authority to regulate wireless carriers." *Ibid.*

c. Judge Carnes dissented. In his view "the statute unambiguously gives the FCC regulatory authority over wireless telecommunications service and Internet service." Pet. App. 41a.

With respect to cable television operators that provide Internet access through cable modems, Judge Carnes reasoned that the majority's conclusion that such Internet access "is neither a cable service nor a telecommunications service, and is thus not covered by the rate formulas described in section 224(d) for 'solely' cable services and in section 224(e) for telecommunications services * * * fails to address the section 224(b)(1) mandate that the FCC 'regulate the rates,

terms, and conditions for pole attachments.'" Pet. App. 39a. He explained that "[b]ecause pole attachment is defined as 'any attachment,' * * * section 224(b)(1) requires the FCC to ensure just and reasonable rates for all pole attachments, including those used to provide Internet service." *Id.* at 39a-40a.

With respect to wireless telecommunications services, Judge Carnes relied again on the fact that "pole attachment" is defined as "*any* attachment by a * * * provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." Pet. App. 37a. In his view, "[a]pplying that definition * * *, the FCC has the authority to regulate *all* attachments, i.e., attachments 'of whatever kind,' by a * * * provider of telecommunications service." *Id.* at 38a (citation omitted). Although the majority had relied on the statutory definition of "utility," Judge Carnes explained that that definition "serves merely to exempt from mandatory access any utility that does not make its poles available for wire communications at all." *Ibid.* But "once a utility makes its poles available, even 'in part,' for wire communications, it is subject to mandatory access for all pole attachments." *Ibid.* In sum, "[n]othing about the definition of utility negates the FCC's mandate to regulate rates for all pole attachments." *Id.* at 38a-39a.

5. The government and other parties sought rehearing en banc. The court of appeals denied that request in a short per curiam order. Pet. App. 44a. Judge Carnes filed a statement concerning the denial of rehearing en banc. He observed that "five of the twelve judges in active service on this Court are disqualified from participating in this important case." *Id.* at 46a. That fact, he explained, made it nearly automatic that the court would deny the government's rehearing en

banc petition, because, under Eleventh Circuit precedent, the court could not grant such a petition without the support of a majority of "all active circuit judges serving on the court at the time of the poll including those judges who are disqualified from participating," and such a majority could not be obtained without the participation of the author of the panel majority's opinion. *Id.* at 45a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals held that the rate protections of the Pole Attachments Act do not apply to cable television systems that provide Internet access in addition to cable television programming over their wires and that those protections do not apply in full (and, under one interpretation, do not apply at all) to providers of wireless telecommunications services. Both of those holdings are wrong. In both rulings, the court of appeals not only contradicted the most natural reading of the text of the Act, but also rejected the interpretation of the Act adopted by the FCC, the agency charged with implementing it. The court of appeals' decision would thereby impede the achievement of national communications policy objectives that Congress embodied in the Telecommunications Act of 1996.

I. The coverage provisions of the Pole Attachments Act provide that the FCC "shall regulate" the rates for "pole attachments," 47 U.S.C. 224(b)(1), and define "pole attachments" as "*any* attachment by a cable television system or provider of telecommunications service," 47 U.S.C. 224(a)(4) (1994 & Supp. IV 1998) (emphasis added). An attachment by a cable television system that is used to provide commingled cable television service and Internet access is an attachment "by a cable television system." Such an attachment is

accordingly protected by the Act. Other provisions of the Act demonstrate that when Congress wanted to exclude certain categories of pole attachments from the otherwise broad terms of the Act, it did so explicitly. Because Congress did not explicitly exclude attachments used to provide cable television service when they are used to provide commingled Internet access as well, it is clear that the Act protects such attachments.

Congress had sound policy reasons not to accept the rule adopted by the court of appeals, which would in effect penalize cable television systems for providing commingled Internet access by removing their attachments from the Act's protections as soon as such access is provided. Two provisions of the Telecommunications Act of 1996 state Congress's intent to encourage the development of broadband access and to promote the continued development of the Internet. Those purposes are consistent with a regime in which cable television systems can provide commingled Internet access without suffering a financial penalty; they are not consistent with the regime envisioned by the court of appeals, in which cable television systems are in effect penalized as soon as they invest in providing broadband Internet access as well as cable television service to their subscribers.

The court of appeals believed that two other provisions of the Act added in 1996, which provide specific rate structures for pole attachments used "solely to provide cable service" and for pole attachments used "to provide telecommunications services," narrowed the general mandate to the FCC to ensure just and reasonable rates for any attachment by a cable television system. That conclusion is mistaken. The two rate provisions do not purport to amend the Act's basic coverage provisions, which were broadened, not narrowed, by the 1996 amendments. Each of the two rate provisions can be given its full scope in governing rates for the particular services covered without upsetting the general and express mandate of the Act that *all* pole attachments by cable television systems are protected by the Act.

Finally, insofar as any doubt may remain regarding the scope of the Act, the FCC's determination that the Act protects attachments used to provide commingled cable television service and Internet access is entitled to deference. Congress delegated to the FCC the authority to implement both the Pole Attachments Act and the Communications Act of which it is a part, and this Court has repeatedly held that courts must defer to the FCC's reasonable constructions of the Communications Act. The FCC's construction of the Act in this case is based on its most natural reading and the policies that underly it. That construction is therefore at the very least reasonable. Accordingly, it should be controlling.

II. The court of appeals also erred in holding that the Pole Attachments Act provides limited or no protection for wireless—as opposed to wireline—telecommunications service. As noted above, the Act defines a covered pole attachment to include "any attachment by a * * * provider of telecommunications service." 47 U.S.C. 224(a)(4) (1994 & Supp. IV 1998). That definition makes no distinction between providers of wireless telecommunications service and providers of wireline telecommunications service. Moreover, the Act's definition of "[t]elecommunications service"—applicable both to the Pole Attachments Act and to the Communications Act as a whole—expressly precludes any such distinction based on the type of facility used to provide the service; it defines such service as the

offering of telecommunications directly to the public "*regardless of the facilities used.*" 47 U.S.C. 153(46) (Supp. IV 1998) (emphasis added).

The court of appeals reasoned that attachments used to provide wireless services were excluded from the full protection of the Act because the only poles covered by the Act are those "owned or controlled by a utility," 47 U.S.C. 224(a)(4) (1994 & Supp. IV 1998), and the term "utility" is defined as a company that owns poles "used, in whole or in part, for any *wire* communications." 47 U.S.C. 224(a)(1) (1994 & Supp. IV 1998). Those definitions, however, concern which poles are subject to the Act. Once it is determined (as is not in dispute in this case) that certain poles are subject to the Act because they are used for wire communications, the Act makes no further distinction based on whether the attachments to those poles are used to provide wireless or wireline telecommunications service. Rather, as noted above, if an "attachment" is made "by a provider of telecommunications service," it is protected by the Act. It makes no difference whether the attaching entity uses wireless, wireline, or some hybrid type of facility to provide the telecommunications service.

The court of appeals supported its exclusion of attachments for wireless telecommunications services by finding that poles are not "bottleneck facilities" for wireless carriers, reasoning that Congress intended the Act to address only the chokehold that telephone and power companies have over bottleneck facilities. The terms of the Act, however, nowhere refer to "bottleneck facilities," and Congress deliberately chose not to entangle questions of coverage under the Act in contentious disputes about which poles are "bottleneck facilities." Accordingly, it is the unqualified term "provider of telecommunications service," not a court's

conception of what constitutes a "bottleneck facility," that defines the scope of the Act's protections. Since the term "provider of telecommunications service" extends to providers of wireless service, the coverage of the Act extends to them as well.

ARGUMENT

I. THE POLE ATTACHMENTS ACT PROTECTS POLE ATTACHMENTS BY CABLE TELEVISION SYSTEMS THAT PROVIDE COMMINGLED CABLE TELEVISION SERVICE AND INTERNET ACCESS

A. Section 224 By Its Terms Protects Attachments To Provide Commingled Cable Television And Internet Access

1. Section 224(b)(1) of the Pole Attachments Act authorizes the FCC to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. 224(b). That language defines the FCC's jurisdiction unambiguously. If an item is a "pole attachment[]," then the FCC has jurisdiction to regulate the "rates, terms, and conditions" for it. If an item is not a "pole attachment[]," Section 224 does not provide the FCC with jurisdiction to regulate its rates, terms, or conditions.

Section 224(a)(4) defines the term "pole attachment." It provides that

> [t]he term 'pole attachment' means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

47 U.S.C. 224(a)(4) (1994 & Supp. IV 1998). When that definition is read together with Section 224(b)'s grant of jurisdiction to the FCC, the result is that if an item is

an "attachment by a cable television system * * * to a pole, duct, conduit, or right-of-way owned or controlled by a utility," then the FCC has jurisdiction to regulate the "rates, terms, and conditions" for it.[5]

2. In the order under review in this case, the FCC addressed the question whether "a cable system is entitled to a Commission-regulated rate for pole attachments that the cable system uses to provide commingled data and video." Pet. App. 85a. In that situation, cable television service and Internet access are routed through the same pole attachments—indeed, through the same wires at the same time. See *BCI Telecom Holding, Inc.* v. *Jones Intercable, Inc.*, 3 F. Supp. 2d 1165, 1170-1172 (D. Colo. 1998). Such pole attachments —just like attachments used solely to provide cable television images—are clearly attachments "by a cable television system." Accordingly, such pole attachments are subject to the protections of the Act. As the FCC explained, because the definitional provisions of the Pole Attachments Act cited above do not "turn on what type of service the attachment is used to provide" so long as it is by a "cable television system," Pet. App. 85a, the terms of the Pole Attachments Act require that "the rates, terms and conditions for all pole attachments by a cable television system are subject to" FCC jurisdiction. *Id.* at 86a.

3. "As in any case of statutory construction, [the] analysis begins with the language of the statute. * * * And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co.* v.

[5] Except where otherwise specified, we use the term "pole" to refer to any of the items to which a "pole attachment" may be made under Section 224(a)(4)—*i.e.*, a "pole, duct, conduit, or right-of-way."

Jacobson, 525 U.S. 432, 438 (1999) (citation and internal quotation marks omitted). The terms of Section 224(a) and (b) of the Pole Attachments Act are exceptionally clear in granting the FCC jurisdiction to regulate pole attachment rates for commingled cable television and Internet service. That clarity is emphasized by two other provisions of the Act that do exclude certain pole attachments from the jurisdiction conferred on the FCC. Those provisions demonstrate that Congress was quite precise in defining the scope of the Act and fully capable of limiting that scope where it saw fit. No such limitation applies to attachments used to provide commingled cable television service and Internet access.

a. Section 224(c) provides that "[n]othing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to * * * pole attachments in any case where such matters are regulated by a State." 47 U.S.C. 224(c)(1) (1994 & Supp. IV 1998). A state regulatory program ousts the Commission of jurisdiction under that provision only if the program satisfies certain statutory requirements.[6] If the State satisfies those conditions, the FCC has no jurisdiction over attachments in that State. See *States That Have Certified That They Regulate Pole Attachments*, 7 F.C.C.R. 1498 (1992) (public notice that FCC has no jurisdiction over pole attachments in 19 jurisdictions that have certified that they satisfy the Section 224(c) conditions).

[6] For example, the State's regulatory program must "consider the interests of * * * the subscribers of the services offered via such attachments" as well as the interests of utility consumers, 47 U.S.C. 224(c)(2)(B) (1994 & Supp. IV 1998), and the State's program must provide prompt action on complaints, 47 U.S.C. 224(c)(3)(B).

b. Section 224(a)(5) provides that "[f]or purposes of [the Pole Attachments Act], the term 'telecommunications carrier' * * * does not include any incumbent local exchange carrier." 47 U.S.C. 224(a)(5) (Supp. IV 1998).[7] Because no incumbent local exchange carrier (ILEC) is a "telecommunications carrier," no ILEC can be a "provider of telecommunications service" for purposes of the definition of "pole attachment" in Section 224(a)(4). Consequently, as the Commission explained, an "ILEC has no rights under Section 224 with respect to the poles of other utilities." Pet. App. 63a. Congress had long ago found when it first enacted the Pole Attachments Act that "poles, ducts, and conduits are usually owned by *telephone* and electric power utility companies, which often have entered into joint use or joint ownership agreements." S. Rep. No. 580, *supra*, at 12 (emphasis added); see also *ibid.* (noting that agreements between telephone and electric utilities usually provide that "communications pole space is * * * under the control of the telephone company"). The evident purpose of the Section 224(a)(5) exclusion of ILECs is that there was no need to provide rate protection to entities that usually owned or controlled the poles themselves.

c. Sections 224(a)(5) and 224(c) demonstrate that Congress knew precisely how to limit the reach of the FCC's jurisdiction and the types of pole attachments covered by the Act when it wanted to do so. Aside

[7] An "incumbent local exchange carrier" is elsewhere specified to be the carrier that provided local telephone service in a given area, typically on a monopoly basis, as of February 8, 1996. 47 U.S.C. 251(h) (Supp. IV 1998). A firm newly attempting to compete in providing telephone service in a local area is generally not an ILEC.

from those exclusions, however, the Act has no other exclusions. "[*A*]*ny* attachment" to a utility pole by a cable television system—including an attachment used to provide commingled cable television and Internet access—is protected by the Act.

4. Finally, the court of appeals' construction is also inconsistent with Section 224(f)(1), which provides that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. 224(f)(1) (Supp. IV 1998). That provision grants an unqualified right of access to cable systems and telecommunications carriers without regard to whether they provide additional services. Such a right of access would be futile if the utility were free to price some of those competing service providers out of the market, as the utility would be free to do to cable systems under the court of appeals' decision. A power to regulate rates narrower than the statutory grant of access does not make sense.

B. Congress Had Sound Policy Reasons For Including Commingled Cable Television Service And Internet Access In The Act's Protections

Under the court of appeals' decision, the full protections of the Act apply to attachments by a cable television system that are used solely to provide conventional cable television programming to its customers. But as soon as the cable television system uses its wires to provide additional services—such as Internet access—to those customers as well, the Act's protections would cease and the utilities that own or control the poles could charge whatever rates they wish for the pole attachments. That result is not only contrary to the plain meaning of the Pole Attachments

Act, but it is inconsistent with the congressional policy underlying the Telecommunications Act of 1996, which was designed in part to encourage the rapid development of inexpensive broadband Internet access. That policy is most clearly manifested in two provisions of the Telecommunications Act—which included the 1996 amendments to the Pole Attachments Act.

First, Congress in the Telecommunications Act directed the FCC to "encourage the deployment" of broadband capability to all Americans and, if necessary, to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment." See Pub. L. No. 104-104, Tit. VII, § 706(a), (b) and (c)(1), 110 Stat. 153 (47 U.S.C. 157 note). Under the FCC's interpretation of the Pole Attachments Act, cable television systems, which already have wires connected to many American homes, may upgrade their facilities to provide commingled Internet access while retaining their protections against monopolistic pricing under the Pole Attachments Act. That will certainly "encourage the development" of broadband capability and "remov[e] barriers to infrastructure development" by the cable industry to provide such capability. By contrast, under the court of appeals' decision, cable television providers would lose their protection from monopolistic prices for pole attachments as soon as they upgrade their facilities to provide commingled Internet access to their customers. That would *discourage* the rapid development of broadband capability, contrary to Congress's expressed policy.

Second, Congress declared in the Telecommunications Act that "[i]t is the policy of the United States * * * to promote the continued development of the Internet and other interactive computer services and

other interactive media." Pub. L. No. 104-104, Tit. V, § 509, 110 Stat. 138 (47 U.S.C. 230(b)(1) (Supp. IV 1998)). The FCC's interpretation of the Act, which permits cable television providers to add commingled Internet access to the services they offer, would make such access more widely available, and it would thus "promote the continued development of the Internet." By contrast, the court of appeals' decision would permit cable television systems to enter the market for broadband Internet access to their existing customers only at the cost of losing the rate protections they currently enjoy for their pole attachments. That would provide a disincentive for cable providers to enter the market for broadband Internet access, and it would thereby retard—not promote—the continued development of the Internet.[8]

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[8] Indeed, as utilities themselves increasingly enter the market for provision of Internet access, they have an incentive not only to charge monopolistic prices for pole attachments, but also to discriminate against their cable company competitors with respect to the terms and conditions of access to the bottleneck facilities at issue here. See *In re Promotion of Competitive Networks in Local Telecommunications Markets*, 14 F.C.C.R. 12,673, 12,681 (1999) (para. 12) (noting that "companies offering or planning to offer two-way broadband services to residential consumers include * * * public utilities within their utility service territories"); *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 14 F.C.C.R. 2398, 2427 (1999) (para. 55) ("A growing number of public utilities are offering broadband within their utility service territories. * * * Utility-based offerings have begun in major northeastern cities, San Francisco, and have begun or are under study in smaller cities.").

C. The Act's Special Rate Provisions For Attachments "Used * * * Solely To Provide Cable Service" Or Attachments "Used By Telecommunications Carriers To Provide Telecommunications Services" Do Not Restrict The Basic Coverage Of The Act

The court of appeals did not dispute that, prior to the 1996 amendments, the Pole Attachments Act applied to attachments used to provide commingled cable television and Internet access. The FCC had concluded that the unamended Act applied to such attachments in a decision that was affirmed by the D.C. Circuit in 1993 in *Texas Utilities Electric Co.* v. *FCC*, 997 F.2d 925. In this case, the Eleventh Circuit distinguished *Texas Utilities* on the ground that it was decided "before the 1996 amendments were enacted," Pet. App. 30a n.32, and the court relied for its contrary conclusion solely on two provisions that were part of the 1996 amendments. See *id.* at 27a (FCC's position "requires us to disregard the unambiguous language *of the 1996 Act*") (emphasis added), 32a ("*[T]he 1996 Act* does not authorize the FCC to regulate pole attachments for Internet service.") (emphasis added). Those provisions do not support the court's result.

1. a. The first provision relied on by the court of appeals was Section 224(d). In the original Act, Section 224(d) specified certain characteristics of what constitutes a "just and reasonable rate" for pole attachments by cable television systems (which were the only pole attachments covered by the Act at that time). Essentially, it provided that a "just and reasonable" rate for such attachments is at least the "marginal cost of attachments," see *Florida Power*, 480 U.S. at 253, and at most the percentage of the total pole expenses equal to the percentage of usable space on the pole occupied by the attachment, or the "fully allocated cost" of the

construction and operation of the pole to which cable is attached, *ibid.* See generally 47 U.S.C. 224(d)(1).

The 1996 amendments made no change to Section 224(d)(1) and (2), which specify the rate methodology. They added, however, a new Section 224(d)(3), which provides that "[t]his subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service." 47 U.S.C. 224(d)(3) (Supp. IV 1998).[9] The 1996 amendments thus require the Commission to grandfather pole attachments for cable systems used "solely to provide cable service" into the preexisting rate structure for attachments. Under the amended Act, the Commission may not determine that pole attachments for such systems are subject to any higher (or lower) rate.

b. The second provision relied on by the Eleventh Circuit is Section 224(e). That provision was added by the 1996 amendments. The 1996 amendments had for the first time expanded the basic definition of "pole attachment"—and, accordingly, the scope of the Act's protections—beyond cable television systems to include "any attachment * * * by a provider of telecommunications service." 47 U.S.C. 224(a)(4) (1994 & Supp. IV 1998). The new Section 224(e) addressed the

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[9] Section 224(d)(3) also includes an interim rule providing that, until the FCC could promulgate new regulations under a newly added subsection (e), "this subsection shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier * * * to provide any telecommunications service." 47 U.S.C. 224(d)(3) (Supp. IV 1998). In a portion of the order under review that is not challenged in this case, the FCC promulgated the new regulations to which Section 224(d)(3) refers. See Pet. App. 59a, 64a-65a, 79a-162a. This part of Section 224(d)(3) accordingly has no continuing effect.

content of the rates for this newly protected class of attachments.

In particular, Section 224(e)(1) requires the Commission to "prescribe regulations * * * to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services." 47 U.S.C. 224(e)(1) (Supp. IV 1998). The "just, reasonable, and nondiscriminatory rates" provided for in such regulations must satisfy certain requirements distinct from those of Section 224(d). The new formula, specified in Section 224(e)(2) and (3), can be quite complex. As the Commission explained in its order, it "allocates the costs of the portion of the total pole cost associated with the usable portion of the pole and the portion of the total pole cost associated with the unusable portion of the pole in a different manner." Pet. App. 66a. Essentially, Section 224(e) "apportion[s] the cost of the space other than the usable space equally among all * * * attachments" and "apportion[s] the cost of the usable space according to the percentage of usable space required for each entity." H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 206 (1996).

Since the Section 224(e) rate includes an allocation for unusable as well as usable space on the pole, it will generally be higher than the rate applicable to pole attachments used "solely to provide cable service" under Section 224(d). At the time the 1996 Act was passed, Congress expected cable operators to go into competition with local telephone companies almost immediately. See H.R. Conf. Rep. No. 458, *supra*, at 148. Section 224(e) thus requires the Commission to level the competitive playing field in the telecommunications area as between cable companies that choose to provide conventional telecommunications services and other carriers providing such service; the rate

prescribed by Section 224(e) applies in both situations. See H.R. Conf. Rep. No. 458, *supra*, at 206; S. Rep. No. 367, 103d Cong., 2d Sess. 65 (1994).

2. The court of appeals read these two provisions—Section 224(d) and (e)—to embody a new limitation on the FCC's jurisdiction, such that a pole attachment used to provide services that fall within neither provision is excluded from the basic "just and reasonable rate" protections of the Act in Section 224(a) and (b). In the court's view, "subsections (d) and (e) narrow (b)(1)'s general mandate to set just and reasonable rates." Pet. App. 27a n.29. The court stated that "[t]he straightforward language of subsections (d) and (e) directs the FCC to establish two specific just and reasonable rates, one for cable television systems providing solely cable service and one for telecommunications carriers providing telecommunications service; no other rates are authorized." *Ibid.* After reaching its own conclusion that Internet access does not qualify either as "solely cable television service" or "telecommunications service"—an issue expressly left open by the FCC, see *id.* at 89a—the court ruled that commingled cable television service and Internet access is therefore outside the FCC's jurisdiction.

3. The court of appeals' conclusion is mistaken. At the most basic level, neither Section 224(d) nor Section 224(e) alters the coverage provisions of the Act in Section 224(a) and (b). Indeed, the only amendment to those coverage provisions made in 1996 served to *broaden* the definition of "pole attachment" to include not merely "any attachment by a cable television system," but rather "any attachment by a cable television system *or provider of telecommunications service.*" 47 U.S.C. 224(a)(4) (1994 & Supp. IV 1998) (emphasis added). That change was a pure extension—not a

narrowing—of the Act's protections. See H.R. Conf. Rep. No. 458, *supra*, at 206 (amendment, which originated in House version of bill, "expands the scope of the coverage of section 224"). Had Congress intended to limit the FCC's authority over attachments to provide cable television service, it surely would have expressed that intention in either the basic regulatory mandate of Section 224(b)(1) or the definitions in Section 224(a). It did neither.

For that reason, the court of appeals erred in stating that, aside from the rates for attachments used "solely to provide cable service" (Section 224(d)) and those used to provide "telecommunications services" (Section 224(e)), "no other rates are authorized." Pet. App. 27a n.29. Section 224(b)(1) expressly authorizes the FCC to ensure "just and reasonable" rates for all items defined as "pole attachments" in Section 224(a)(4)—even those that fall outside the categories in Section 224(d) and (e). For attachments by a cable television system that fall outside those categories, Congress has not further specified the content of the rates. But Congress nonetheless authorized the FCC in Sections 224(a) and (b) to ensure that they are "just and reasonable."[10]

4. Nor is there anything in Section 224(d) and (e) that purports to "narrow [Section] (b)(1)'s general mandate to set just and reasonable rates" for pole attachments. Pet. App. 27a n.29. Those provisions each address a different issue—the specification of what

[10] In a ruling not at issue in this case, the FCC carried out its mandate to ensure that rates for commingled cable television service and Internet access are "just and reasonable" by providing that such rates would be the same as the Section 224(d) rates for attachments used solely to provide cable service. See Pet. App. 87a-90a.

constitutes a "just and reasonable" rate for particular categories of pole attachments. Section 224(d)(1), for example, begins by stating that "a rate is just and reasonable" if it satisfies certain conditions, and Section 224(d)(3) provides that "[t]his subsection shall apply to the rate" for pole attachments used "solely to provide cable service." 47 U.S.C. 224(d)(3) (Supp. IV 1998). Section 224(d) thus unambiguously requires the FCC to set rates for pole attachments used "solely to provide cable service" within the statutory parameters. While Section 224(d) therefore dictates the contents of some rates, it does not have anything to do with excluding rates for other attachments from the protections of the Pole Attachments Act altogether.

Similarly, Section 224(e) requires the FCC to prescribe regulations "to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services." 47 U.S.C. 224(e)(1) (Supp. IV 1998). It goes on, unambiguously, to require the FCC to set rates for such pole attachments within certain statutory parameters. Like Section 224(d), however, it contains nothing suggesting any withdrawal of the FCC's power to regulate rates for other pole attachments.

D. The Court Of Appeals' Construction Of The Act Disregarded Settled Principles Under Which The FCC's Construction Of The Communications Act Is Entitled To Deference

1. We have demonstrated that the text and purpose of the Pole Attachments Act both require reversal of the court of appeals' conclusion. If any doubt remained on the subject, however, the fact that the FCC has construed the Act to govern rates for pole attachments

for commingled cable television service and Internet access would eliminate it.

There can be no doubt that Congress has delegated to the FCC the authority to implement the Pole Attachments Act. The Act itself is framed as a grant of ratemaking authority to the Commission in Section 224(b)(1), and another portion of that same Section provides that "[t]he Commission shall prescribe by rule regulations to carry out the provisions of this section." 47 U.S.C. 224(b)(2). In addition to that specific authority, the Pole Attachments Act is a part of the Communications Act of 1934. See 92 Stat. 35 (originally enacting the Pole Attachments Act by providing that "the Communications Act of 1934 is amended by adding at the end thereof the following new section"). As this Court noted in *AT&T* v. *Iowa Utilities Board*, 525 U.S. 366, 377 (1999), Section 201(b) of the Communications Act provides that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of [the Communications Act of 1934]." 47 U.S.C. 201(b). Thus, there is more than ample basis to conclude that Congress entrusted the FCC with authority to implement and construe the Pole Attachments Act.

This Court has acknowledged that the Commission's reasonable resolutions of any ambiguities in the Communications Act (and, hence, the Pole Attachments Act which forms a part of it) are therefore controlling. In *Iowa Utilities Board*, for example, much of the Court's decision rested on the proposition that the FCC's reasonable interpretations of the Act are entitled to be upheld. See, *e.g.*, 525 U.S. at 387 (upholding an FCC definition of a statutory term because it is "eminently reasonable"), 394 (upholding FCC rule because "we cannot say that [the rule] unreasonably interprets the

statute"). As the Court summarized, "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *Id.* at 397 (citing *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984)).

If there are any ambiguities with respect to the scope of the protections of the Pole Attachments Act, the FCC's reasonable resolution of those ambiguities is therefore dispositive. As we have explained above, the FCC applied the Act according to its most natural interpretation and entirely consistently with the policies that underly it to protect attachments used to provide commingled cable television service and Internet access. The FCC's interpretation is at the very least a reasonable one, and it accordingly suffices to remove any lingering uncertainty about the scope of the Act's protection.

2. Because the court of appeals erroneously believed that a pole attachment by a cable television system receives statutory protection only if it is used to provide services falling within one of the two rate categories set forth in Section 224(d)(3) and Section 224(e)(1), it mistakenly felt compelled to address whether a cable company's provision of Internet access is properly characterized as a "cable service," a "telecommunications service," or an "information service." See Pet. App. 27a-29a. The Commission had based its conclusion that attachments to provide commingled cable television service and Internet access are protected by the Act squarely and exclusively on the broad provisions and definitions of Section 224(b)(1) and (a)(4). See Pet. App. 85a-86a. The Commission specifically cautioned that it "need not decide at this time * * * the precise category into which Internet services fit," *id.* at 89a, and the Commission referred to ongoing

proceedings it had undertaken at Congress's direction that would reconsider its earlier conclusion in another proceeding that the provision of Internet access is not the provision of telecommunications service, *id.* at 87a-89a. To date, the FCC has taken no position on that issue, which has very broad implications for the rights and obligations of cable systems—including the exceptionally important question whether a cable operator can be compelled to provide unaffiliated Internet service providers with "open access" to its cable facilities. See *ibid.*; see also *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 15 F.C.C.R. 19,287, 19,293-19,298 (2000) (paras. 14-24) (seeking comment on proper statutory classification of high-speed Internet access using cable modem technology); *In re Federal-State Joint Board on Universal Service*, 13 F.C.C.R. 11,501, 11,535 n.140 (1998); but cf. *AT&T* v. *City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000) (holding that "to the extent that [a firm] provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act").

Even if the court of appeals were correct that the coverage question in this case turns on the correct characterization of Internet access, there would still be no need for this Court in the first instance to rule on that characterization question. If the Court concluded that FCC authority over pole attachments by cable television systems that provide commingled Internet access depended on whether such Internet access is a "cable service," a "telecommunications service," or some other kind of service, the appropriate course for this Court would be to remand the case to the FCC—the step the court of appeals should itself have taken

when it ruled (mistakenly) that the characterization of Internet access was determinative. Because implementation of the Communications Act is entrusted to the FCC, it is that agency—not this Court and certainly not the court of appeals—that should address the characterization issue in the first instance. See *IRS* v. *FLRA*, 494 U.S. 922, 933 (1990) (citing *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943)).

II. THE POLE ATTACHMENTS ACT PROTECTS PROVIDERS OF WIRELESS TELECOMMUNICATIONS SERVICE NO LESS THAN PROVIDERS OF WIRELINE TELECOMMUNICATIONS SERVICE

1. As explained above, the protections of the Pole Attachments Act apply to "any attachment by a * * * provider of telecommunications service." 47 U.S.C. 224(a)(4) (1994 & Supp. IV 1998). "Telecommunications service" is defined as the offering of telecommunications for a fee directly to the public "regardless of the facilities used." 47 U.S.C. 153(46) (Supp. IV 1998); see also 47 U.S.C. 153(43) (Supp. IV 1998) (defining "telecommunications"). Congress thus unambiguously applied the protections of Section 224 to "any attachment" by carriers that provide "telecommunications for a fee directly to the public * * * regardless of the facilities used." See Pet. App. 95a. As that language specifies, the particular facilities used to provide telecommunications services—wireless, wireline, or some combination of the two—are of no consequence. Congress could not have been clearer in extending the Section 224 protections to attachments used to provide wireless telecommunications services to the same extent as wireline telecommunications services.

That conclusion follows as well from Section 224(d)(3) of the Act. As we have noted, see p. 23 n.9, *supra*, that

provision states that the Section 224(d) rate formula "shall apply to the rate for any pole attachment used by a cable system or *any* telecommunications carrier * * * to provide any telecommunications service" until the FCC could adopt regulations specifically applicable to providers of telecommunications services. 47 U.S.C. 224(d)(3) (Supp. IV 1998) (emphasis added). As the FCC recognized, in Section 224(d)(3) as in Section 224(a)(4), "the use of the word 'any' precludes a position that Congress intended to distinguish between wire and wireless attachments." Pet. App. 95a. Cf. *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind.") (internal quotation marks and citation omitted).

2. The court of appeals did not hold that anything in the definition of the term "telecommunications service" or related terms suggests that it applies only to wireline, and not wireless, services. Instead, the court of appeals excluded attachments used to provide wireless services from the full protection of Section 224 on the ground that the Pole Attachments Act protects only attachments to poles "owned or controlled by a utility," 47 U.S.C. 224(a)(4) (1994 & Supp. IV 1998), and that the Act elsewhere defines a "utility" as a company that owns poles "used, in whole or in part, for any *wire* communications." 47 U.S.C. 224(a)(1) (1994 & Supp. IV 1998) (emphasis added). The court of appeals detected a "negative implication" in those provisions, such that they "give the FCC authority to regulate attachments to poles used, at least in part, for *wire* communications, and * * * do[] not give the FCC authority over attachments to poles for *wireless* communications." Pet. App. 22a.

There is no relevant "negative implication" in the provisions cited by the courts of appeals. To be sure, the provision defining "utility" does preclude the FCC from regulating the rates for attachments to *poles* that are not used for wire communications. That is not a "negative implication" of the statutory text, but rather a direct consequence of the fact that authority over such poles is nowhere granted to the FCC and that the FCC may exercise only authority granted to it by Congress. Once a pole owned by an electric or telephone company or some other utility is used for wire communications, however, it comes within the definition of a "pole * * * controlled by a utility" under the Act and attachments to it come within the Act's protections. The question whether a particular attachment to that pole is covered by the Act turns on whether the attachment is made "by a cable television system or provider of telecommunications services"—a question that has nothing to do with the definition of "utility."

3. The court of appeals' misreading of the statutory text should be corrected, and further analysis of the policy rationales for protecting (or not protecting) attachments used for wireless communications are largely beside the point. Moreover, the court of appeals' effort to support its result with reference to the policies of the Pole Attachments Act is also unpersuasive. The court stated that Congress's purpose in passing the Act was "to prevent the telephone and power companies from charging monopoly rents to connect to their bottleneck facilities." Pet. App. 24a (footnote omitted). The court believed that "[utility] poles are not bottleneck facilities for wireless carriers."

Ibid.[11] The court concluded that "[b]ecause they are not, and because the 1996 Act deals with wire and cable attachments to bottleneck facilities, the act does not provide the FCC with authority to regulate wireless carriers." *Id.* at 25a.

As a legal matter, the terms of Section 224(a)(4) are dispositive, regardless of whether those terms extend rate protections to a larger class of beneficiaries or attachments than the particular subclasses with which Congress was most acutely concerned. "[I]t is not, and cannot be, [judicial] practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy." *Brogan* v. *United States*, 522 U.S. 398, 403 (1998). The language of the Pole Attachments Act uses the unqualified term "provider of telecommunications service" to define the entities whose attachments are protected by the Act. The Act does not use the term "bottleneck facility" or any cognate term. Accordingly, it is the unqualified statutory term "provider of telecommunications service"—not a court's conception of what constitutes a "bottleneck facility"—that controls how far the Act extends. Since the term "provider of telecommunications service" extends to providers of wireless service, the coverage of the Act extends to them as well.

As a factual matter, the panel majority was wrong in suggesting that utility poles are not "bottleneck facilities for wireless systems." Wireless systems are

[11] In the court's view, wireless "equipment can be placed on any tall building" and the structure of wireless networks limits the reliance of such networks on any one antenna. Pet. App. 25a. The court did not explain the source for those observations, and a court should not rely on such considerations without at the very least permitting the FCC to examine the relevant facts in the first instance.

typically wireless only between the subscriber's wireless telephone (or, in the case of "fixed wireless" systems, between a central location in the subscriber's building) and the nearest receiving antenna. Wireless providers often depend on wires attached to poles to get their signals from such antennas back to a central location, where they are connected to a network that may itself include pole-to-pole wireline facilities.[12] As a practical matter, a wireless telecommunications service may well depend vitally on poles owned or controlled by utilities to provide service to its customers.

4. The court of appeals' decision might have rested on a misunderstanding of industry realities, and perhaps the decision may reasonably be construed not to exclude a wireless carrier's wireline facilities from the scope of Section 224. In any event, this Court

[12] In *In re Promotion of Competitive Networks in Local Telecommunications Markets*, 14 F.C.C.R. 12,673 (1999), the FCC addressed the need to increase competition for local telephone service, including the removal of obstacles to the ability of "fixed wireless" systems to gain access to multi-unit residential and commercial buildings. The Commission explained that "the prospects for facilities-based competition in the near term are especially great from providers that can avoid the need to duplicate the incumbent [provider's] costly wireline networks, * * * by using wireless technology." *Id.* at 12,677 (para. 5). Such fixed wireless providers frequently mix wireline and wireless elements in their networks. For example, "providers using wireless technology may need access to rooftops on which to place their antennas, and to conduit for laying cable to carry signals from the antenna * * * directly to individual units." *Id.* at 12,691 (para. 34). See also *id.* at 12,686 (para. 25) (noting that"carriers may want to use terrestrial wireless technology in lower spectrum bands or satellite technology to offer customers mobility, but use higher-band terrestrial wireless service or wireline technology for other features, such as broadband interconnectivity, or for transport and termination between cell sites and the public switched network.").

should make clear that Section 224 by its terms extends to "any" attachment by any telecommunications carrier, including any and all attachments by providers of wireless telecommunications services. 47 U.S.C. 224(a)(4) (1994 & Supp. IV 1998). Even if there were any ambiguity in the Act itself, the FCC's construction of the statute as applicable to both wireless and wireline telecommunications carriers is at the very least a reasonable one. Accordingly, that construction should be controlling. See *AT&T* v. *Iowa Util. Bd.*, 525 U.S. at 377.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioner,

v.

GULF POWER CO., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF RESPONDENT WORLDCOM, INC. IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the provisions of the Pole Attachments Act apply to attachments by cable television systems that are simultaneously used to provide high-speed Internet access and conventional cable television programming.

LIST OF PARTIES AND AFFILIATES

The following are parties to the proceeding before this Court:

Federal Communications Commission, Petitioner

United States of America, Petitioner

National Cable Television Association, Petitioner

WorldCom, Inc., Respondent

Alabama Power Co., Respondent

American Electric Power Service Corp., Respondent

Atlantic City Electric Co., Respondent

Commonwealth Edison Co., Respondent

Delmarva Power & Light Co., Respondent

Duke Energy Corp., Respondent

Georgia Power Co., Respondent

Gulf Power Co., Respondent

Mississippi Power Co., Respondent

Potomac Electric Power Co., Respondent

Public Service Electric & Gas Co., Respondent

Savannah Electric Power Co., Respondent

Tampa Electric Co., Respondent

TXU Electric Co., Respondent

Virginia Electric & Power Co., Respondent

Pursuant to Rule 29.6 of the Rules of this Court, respondent WorldCom, Inc. ("WorldCom") states that it is a Georgia corporation which, along with wholly-owned subsidiaries, provides local and long distance telecommunications services and Internet services

domestically and internationally. WorldCom is a publicly-traded company on the Nasdaq National Market under the symbol "WCOM." WorldCom has no parent corporations, and no publicly held company owns 10% or more of WorldCom stock. WorldCom owns a controlling interest in Embratel Participacoes S.A., which issues shares to the public.

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BRIEF OF RESPONDENT WORLDCOM, INC. IN SUPPORT OF PETITIONERS

The first of the two questions presented here is whether the protections of the Pole Attachments Act (the "Act") apply to *cable systems* that simultaneously provide cable and Internet services over wires attached to utility poles. The Federal Communications Commission ("FCC" or "Commission") ruled that cable operators are entitled to pay the § 224(d) rate even if they provide Internet as well as cable services using these attachments. NCTA Pet. App. 62a-67a.[1] The court below and respondents take issue with the FCC's conclusion, primarily based on the limiting language in § 224(d)(3) that this subsection applies to the rate for any pole attachment used by cable operators "solely" to provide cable service.

WorldCom, Inc. ("WorldCom") respectfully submits this brief to urge the Court to make clear that its answer to this question does not necessarily resolve a separate question that the court below did not decide: whether the Act's protections apply to *telecommunications carriers* like WorldCom that simultaneously provide telecommunications and Internet services over wires attached to utility poles. Unlike § 224(d)(3), the subsection of the Act applicable to telecommunications carriers—§ 224(e)(1)—is *not* limited to rates for attachments used "solely" to provide telecommunications services.

INTEREST OF WORLDCOM

WorldCom provides both telecommunications and Internet services. Like all Internet service providers ("ISPs"), WorldCom uses telecommunications services as one element of its Internet services, and WorldCom also sells its telecommunications services to other ISPs for use in their Internet services. As a result, the wires that WorldCom uses

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[1] All cites to the Appendix are to the Appendix filed by petitioner National Cable Television Association, Inc. ("NCTA") in No. 00-832.

to provide telecommunications services carry Internet traffic along with voice and other data traffic. These wires are often attached to poles leased from utilities pursuant to the Act, and the regulated rate established by § 224(e) applies to the space on these poles leased by WorldCom. In these respects, WorldCom is typical of other telecommunications carriers: virtually all telecommunications carriers provide Internet as well as telecommunications services; virtually all use the same wires for both types of services; and because of the dramatic growth of the Internet, virtually all wires used to carry telecommunications traffic also carry Internet traffic.

Undoing the FCC's decision that the Act applies to attachments by telecommunications carriers used to provide Internet service would have severe consequences for carriers and their customers. Utilities would charge WorldCom and other telecommunications carriers substantially more, or even refuse to provide any access at all, for attachments for wires that carry both telecommunications and Internet traffic. As a result, placing these attachments outside the protection of the Act would substantially increase the costs of WorldCom and other carriers, and result in higher prices for consumers of both Internet services and telecommunications services.

This issue is of immediate concern to WorldCom and other telecommunications carriers. One respondent utility has contended that the decision below permits utilities to deny all rights under the Act to telecommunications carriers that provide Internet service in competition with utilities. The company now known as Dominion Virginia Power moved to dismiss an FCC complaint by a telecommunications carrier on the ground that the court below held that telecommunications carriers providing commingled telecommunications and Internet service have no right to attach their wires to utility poles, much less to pay a regulated rate for these attachments. Motion of Virginia Electric and Power Company to Dismiss Complaint for Lack of Jurisdiction, *In*

the Matter of Cavalier Telephone Co., LLC v. Virginia Elec. & Power Co., PA No. 99-005 (dated May 1, 2000).

OPINIONS BELOW

The opinion of the court of appeals in *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000), is reprinted at NCTA Pet. App. 1a-37a. The court of appeals' unpublished orders denying the petitions for rehearing and rehearing *en banc* are reprinted at Pet. App 77a-96a. Relevant portions of the FCC's decision, *In re Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 F.C.C.R. 6777 (1998), are reprinted at NCTA Pet. App. 38a-68a.

JURISDICTION

The opinion of the court of appeals was issued on April 11, 2000. In orders dated September 12, 2000, the court of appeals denied timely petitions for rehearing or rehearing *en banc* by the FCC, NCTA, and WorldCom. The FCC, the United States, and NCTA timely petitioned for a writ of *certiorari* on November 22, 2000. This Court's jurisdiction to decide this case arises under 28 U.S.C. § 1254(1) (1994).

STATUTORY PROVISIONS INVOLVED

The Pole Attachments Act, 47 U.S.C. § 224 (1994 & Supp. IV 1998), as amended by § 703 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), is reproduced at NCTA Pet. App. 97a-102a.

STATEMENT OF THE CASE

WorldCom adopts the FCC's Statement of the Case.

SUMMARY OF ARGUMENT

If the Court agrees with the FCC that the protections of the Act apply to attachments for wires used to provide both *cable* and Internet services, it necessarily follows that the Act

applies to attachments for wires used to provide both *telecommunications* and Internet services. However, if the Court accepts the argument of the respondent utilities that the Commission lacks jurisdiction over pole attachments by *cable systems* providing Internet services, the Court should make clear that it is not deciding the separate question of whether the FCC lacks jurisdiction over attachments used by *telecommunications carriers* in connection with their Internet services.[2]

Regardless of the Court's decision with respect to commingled cable and Internet services, the FCC reasonably interpreted § 224(e) to give telecommunications carriers the right to pay the statutory rate for attachments used to provide wireline telecommunications services when the same wires are also used for non-telecommunications service, including Internet service. Overturning the FCC's construction of a statutory provision that does not unambiguously preclude this interpretation would violate the principles of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

To show how different are the issues involving telecommunications carriers (and not to ask the Court to answer a question not presented), WorldCom explains why the language, structure, and purposes of the Act demonstrate that the Act applies to attachments by telecommunications carriers

[2] The decision below did not directly address this issue, although the utilities' position is inconsistent with the lower court's holding that the protections of the Act apply to any attachment used "at least in part" to provide wire communications, its broad definition of "telecommunications carrier," and its distinction of *Texas Utilities Electric Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993). *See* pages 7-8 & n.6 below. Because one utility (mistakenly) took the position that the decision reversed the FCC on this ground (*see* pages 2-3 above), WorldCom asked the panel below to clarify that its decision did not limit the rights of telecommunications carriers under § 224(e). The panel declined WorldCom's request without explanation. NCTA Pet. App. 82a.

that also provide Internet services. *First*, the express language of § 224(e)(1) requires the FCC to regulate "the charges for pole attachments used by telecommunications carriers to provide telecommunications services," and a telecommunications carrier that provides Internet services is still a telecommunication carrier. *Second*, although the subsection specifically addressing cable systems applies to rates for attachments used "solely" to provide cable services, the subsection applicable to telecommunications carriers is *not* limited to rates for attachments used "solely" to provide telecommunications services. *Third*, interpreting § 224(e) to apply to attachments by telecommunications carriers that also provide Internet services promotes the purposes of the Act by enabling carriers to compete on an equal basis against utilities that themselves provide telecommunications and Internet services.

ARGUMENT

The language, structure, and purposes of the Act demonstrate that the Act applies to telecommunications carriers that provide Internet services, even if the Court were to determine that the Act does not apply to attachments by cable systems that provide Internet service.

1. The express language of § 224(e)(1) requires the FCC to regulate "the charges for pole attachments used by telecommunications carriers to provide telecommunications services," and § 224(a)(4) defines the term "pole attachment" to mean "any" attachment by a "provider of telecommunications service." A telecommunications carrier that also provides Internet services is still a telecommunications carrier and provider.[3] At a minimum, it was reasonable for the FCC

[3] The Communications Act defines "telecommunications carrier" to mean "any provider of telecommunications services," and the last sentence of this definitional provision expressly recognizes that a telecommunications carrier may provide non-telecommunications

to interpret the term "telecommunications carriers" in § 224(e)(1) to include firms that provide both telecommunications and Internet services.[4]

2. As the decision below recognized, the 1996 amendments to the Act treat attachments by telecommunications carriers separately from attachments by cable companies. As amended in 1996, the Act specifies that the § 224(d) rate is available for attachments by cable systems used "*solely* to provide cable service" (emphasis added) but that the § 224(e) rate is available for attachments by carriers

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services. *See* 47 U.S.C. § 153(44). The court below broadly defined telecommunications carriers to include companies that provide non-telecommunications services as well as telecommunications services: "the term 'telecommunications service providers' includes cable television companies that provide telecommunications services in addition to cable services." NCTA Pet. App. 11a n.14; *see* 47 U.S.C. § 224(d)(3) (cable systems that use pole attachments to provide any telecommunications service shall pay the § 224(e) rate when FCC regulations implementing § 224(e) become effective). The term is easily broad enough to include companies that provide Internet services in addition to telecommunications services.

[4] The utilities contend that the 1996 amendments to the Act exclude "facilities-based Internet service providers which are *not* cable companies or telecommunications carriers." *See* Brief in Opposition at 12 (emphasis added). Whatever the scope of any such exclusion, the broadband Internet access service provided by cable companies includes both a telecommunications service and an Internet service, *AT&T Corp. v. City of Portland*, 216 F.3d 871, 877-78 (9th Cir. 2000), so any cable system providing Internet service is necessarily also providing telecommunications service. As the FCC agrees, a cable system that provides a telecommunications service must pay the § 224(e) rate, not the rate that § 224(d) sets for attachments by cable systems used "solely" to provide cable services. *In re Amendment of Rules and Policies Governing Pole Attachments*, 15 F.C.C.R. 6453, 6457-58 ¶ 5 & nn. 28 and 31 (2000); *see* note 3 above. However, because neither the FCC nor the Eleventh Circuit reached this issue in the proceeding below, this Court need not decide it here, leaving the parties free to make their arguments in subsequent FCC proceedings.

used to provide telecommunications services.[5] By including the limiting word "solely" in the section applicable to cable companies, and omitting it from the section applicable to telecommunications carriers, Congress plainly intended to require utilities to charge the § 224(e) rate for attachments by any telecommunications carrier, even if that carrier does not provide "solely" telecommunication services. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quotation omitted, brackets in original).

Any other conclusion would create a conflict with *Texas Utilities.Electric Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993), a decision that the court below distinguished based on the new "solely" language in § 224(d)(3). *See* NCTA Pet. App. 27a n.32. In *Texas Utilities*, the D.C. Circuit considered whether the pre-1996 version of the Act permitted cable systems to pay the regulated rate when they provide cable services commingled with non-cable services. As the court below explained, the D.C. Circuit approved deference "to the FCC's interpretation that co-mingled services were covered by section 224" because, prior to 1996, § 224 "did not specify the particular services of a cable television system that were entitled to a regulated rent." *See* NCTA Pet. App. 28a n.32.

According to the court below, the current situation with respect to cable services is different because the 1996 amendments "eliminate[d] the ambiguity at issue in" *Texas*

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[5] The court below observed, "The straightforward language of subsections (d) and (e) directs the FCC to establish two specific just and reasonable rates, one for cable television systems providing *solely* cable service and one for telecommunications carriers providing telecommunications service . . . ." NCTA Pet. App. 25a n.29 (emphasis added).

Utilities by adding a new § 224(d)(3) with the "solely to provide cable service" language. *See* NCTA Pet. App. 28a n.32. The utilities themselves distinguish *Texas Utilities* based on this new restrictive language. Brief in Opposition at 10-11. However, with respect to the application of § 224(e) to telecommunications services, the situation is the same as it was for cable services before 1996: like § 224(d)(3), § 224(e) was added by the 1996 amendments; but § 224(e) does *not* limit the type of services a telecommunications carrier may provide using an attachment, so long as it uses the attachment at least in part to provide telecommunications services over wires.[6] *Chevron* principles therefore require that the FCC's interpretation of § 224(e) be upheld, just as the D.C. Circuit correctly deferred to the FCC's interpretation of the pre-1996 § 224(d).

3. The FCC's conclusion is consistent with the purposes of the Act as well as its language. Indeed any contrary interpretation would frustrate the statutory purposes.

a. The utilities' interpretation would nullify a core purpose of the 1996 Act by giving utilities a major advantage over the telecommunications carriers with which they compete to provide telecommunications services. A utility's duty under § 224(e) to provide nondiscriminatory access to telecommunications carriers is triggered only if the utility provides wire communications using attachments to its poles or decides to allow others to do so. *See* 47 U.S.C. § 224(a)(1); NCTA Pet. App. 10a-11a & n.12. The 1996 amendments to the Act were intended to level the playing field between utilities and competing providers of telecommunications services for whom "utility poles afforded the only feasible

[6] The decision below acknowledged that the Act applies to any attachment used "in part" to provide wire communications. NCTA Pet. App. 20a-21a (citing § 224(a)(1)). An attachment used in part to provide telecommunications service and in part to provide Internet service is, by definition, used in part to provide a covered service.

means for stringing their wires." *See id.* at 10a. The statutory goal is "to prevent the telephone and power companies from charging monopoly rents to connect to their bottleneck facilities" in these circumstances. *Id.* at 23a (footnote omitted).

Allowing utilities to charge a monopoly price, or even deny access, to telecommunications carriers that also provide Internet service would give utilities a discriminatory advantage in the telecommunications business. This is especially true because, under the utilities' interpretation, a utility subject to this nondiscrimination obligation could charge a prohibitive price to any competing telecommunications carrier that provides Internet service only on an incidental basis – for example, if a telecommunications carrier uses the wires attached to poles 99% for telecommunications traffic and 1% for Internet traffic.[7] Like WorldCom, telecommunications carriers that provide telecommunications service over their own wires generally also provide Internet service.

b. The utilities' unfair advantage would be further magnified because utilities use their attachments to provide Internet service along with their telecommunications service in competition with firms that also offer the same two types of service. For example, Dominion Virginia Power, the utility seeking to deny attachment rights to

[7] Any rule that allowed telecommunications carriers to pay a regulated rate for attachments only if the wires attached to poles carried less than a specified percentage of Internet traffic would be unworkable as well as arbitrary because carriers are not able to measure the relative amount of Internet and non-Internet traffic on their wires. Indeed, telecommunications carriers generally have no way of knowing how a customer uses a telecommunications service—including whether the customer uses the service to carry Internet traffic or voice calls. The utilities agreed that a telecommunications carrier "does not have any obligation under these rules to monitor its customer's use of the telecommunications services provided." Reply of Petitioner Texas Utilities Elec. Co., at 13 (11th Cir. filed Jan. 27, 1999).

telecommunications carriers that also provide Internet services (*see* pages 2-3 above), itself provides Internet access over its telecommunications network, as demonstrated by its web site (http://www.vpsc.com). Utilities should not have a substantial advantage in competing against companies that seek to provide the same package of telecommunications and Internet services that the utilities themselves provide. The utilities' misinterpretation of § 224(e) would give telecommunications carriers a Hobson's choice: either give up the right to pay the regulated rate, or give up the ability to compete effectively against the utilities and other companies that provide both telecommunications and Internet services.

c. Allowing utilities to charge a monopoly price would violate the principle that the rate for attachments should not differ if the burden on the pole owner resulting from the attachments does not differ. The court below upheld the FCC's decision not to permit utilities to prevent telecommunications carriers from attaching dark fiber because "dark fibers place no more burden on a pole than do their host attachments." NCTA Pet. App. 31a. The equipment used to provide Internet service is not, and as a practical matter cannot be, attached to poles. This equipment consists of routers, switches, modems, and other sophisticated equipment that is situated inside in buildings, not attached outside to poles. No Internet-specific equipment is attached to poles. Whether the wires attached to utility poles carry Internet traffic as well as telecommunications traffic makes no difference whatever to the utility. The pole attachment is exactly the same whether or not the telecommunications carrier provides Internet service. Telecommunications carriers should be entitled to use the attachment to provide any service that does not impose additional costs on pole owners or raise safety, reliability, or other problems in violation of § 224(f)(2). The § 224(e) rate fully compensates pole owners for the use of their poles.

d. It is appropriate that telecommunications carriers have greater flexibility under § 224(e) than cable systems have under § 224(d) because the § 224(e) rate paid by telecommunications carriers is generally higher that the § 224(d) rate paid by cable companies. *See* NCTA Pet. App. 67a ¶ 34.

e. Finally, allowing telecommunications carriers to pay the § 224(e) rate if they provide Internet services along with telecommunications services is fully consistent with the principle that the 1996 Act does not give the FCC authority to regulate ISPs, the Internet, or Internet services with respect to pole attachments. *See* NCTA Pet. App. 25a, 28a, 31a n.34. Internet services are information services, not telecommunications services. *Compare* 47 U.S.C. § 153(20) (defining "information service") *with* § 153(46) (defining "telecommunications service"). Telecommunications services are an input to Internet services, so "ISPs use telecommunications to provide information service." *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 7 (D.C. Cir. 2000); *see In re Federal-State Joint Bd. on Universal Service*, 13 F.C.C.R. 11501, 11529 ¶ 57, 11532-33 ¶¶ 66-67 (1998) (ISPs use but do not provide telecommunications services).

When the government regulates the rate paid by a company that uses an attachment for telecommunications services and that also happens to provide Internet services over the same wires, it is regulating telecommunications services that happen to be used as an input into Internet services; it is not regulating the Internet or Internet services. The rate is regulated because the attachment is used to provide telecommunications services, not because these telecommunications services are in turn used in connection with Internet services. The FCC (like state utility commissions that regulate pole attachments pursuant to § 224(c)) regulates attachers as providers of telecommunications services, not as ISPs.

Just as the Act does not regulate the Internet when it protects telecommunications carriers that sell telecommunications services to unaffiliated ISP customers for use in their Internet services, it does not regulate the Internet when it protects telecommunications carriers that use the same wires for their own Internet services. The utilities agree that "[w]hen MCI uses an attachment to provide a telecommunications service—even to an Internet service provider—it should be entitled to the subsection (e) rates for the attachment." Reply of Petitioner Texas Utilities Electric Co., at 13 (11th Cir. filed Jan. 27, 1999).[8] It would be perverse if pole owners could charge only the § 224(e) rate when Internet service is provided by an ISP customer of a telecommunications carrier that attaches the wire that carries the Internet traffic, but pole owners could charge a higher rate, or deny access altogether, if the carrier provides the same Internet service itself over the same wires. It makes no difference to the pole owner whether the attaching carrier, or the carrier's ISP customers, or both, provide the Internet service. Because unaffiliated ISPs may purchase telecommunications services from telecommunications carriers that pay regulated rates for pole attachments, it is only reasonable to interpret the statute to afford telecommunications carriers the Act's protection if they use the same telecommunications services in the same

[8] As common carriers, telecommunications carriers cannot refuse to sell telecommunications services to ISPs merely because they are ISPs, any more than they can refuse to sell telecommunications services to any other type of customer engaged in a telecommunications-intensive business. *See Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926-27 (D.C. Cir. 1999) (upholding FCC's interpretation of "telecommunications carrier" to mean common carrier). As a purchaser of telecommunications services, "an ISP appears ... no different from many businesses, such as pizza delivery firms, travel reservation agencies, credit card verification firms, or taxicab companies, which use a variety of communication services to provide their goods or services to their customers." *Bell Atlantic Tel. Cos.*, 206 F.3d at 7 (citation and quotation omitted).

way as their customers—as an ingredient for Internet services.

CONCLUSION

For the foregoing reasons, WorldCom respectfully requests that the Court avoid calling into question the FCC's interpretation of § 224(e) to allow telecommunications carriers to pay the regulated rate for attachments used at least in part to provide telecommunications services, regardless of whether the attached wires are also used for Internet services.

Respectfully submitted,

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Nos. 00-832 & 00-843

IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

GULF POWER COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTIONS PRESENTED

Under Section 224 of the Communications Act, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 224, the Federal Communications Commission has limited authority to regulate the rates, terms, and conditions of agreements between utilities and cable operators or telecommunications carriers regarding wireline pole attachments used to provide cable or telecommunications services. The questions properly presented are:

1. May the FCC, pursuant to Section 224, regulate pole attachments used to provide Internet service, which never has been determined to be either a cable or telecommunications service?

2. May the FCC, pursuant to Section 224, regulate the rates that utilities charge others for the right to affix non-wireline telecommunications equipment to utility property?

RULE 29.6 STATEMENT

TXU Electric Company, formerly known as Texas Utilities Electric Company, is a wholly-owned subsidiary of TXU Corp, formerly known as Texas Utilities Company.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENT TXU ELECTRIC COMPANY

TXU Electric Company ("TXU Electric"), formerly known as Texas Utilities Electric Company, by counsel, hereby respectfully requests that the Court affirm the decision of the United States Court of Appeals for the Eleventh Circuit.

COUNTER STATEMENT OF THE CASE

1. Procedural Posture. In Section 224 of the Communications Act, Congress provided the FCC with limited authority to regulate the rates, terms, and conditions of pole attachment agreements between utilities and either cable operators or telecommunications carriers. *See* 47 U.S.C. § 224(a)(4) & (b). For these entities, Congress established specific rate-making methodologies for pole attachments "used by a cable television system solely to provide cable service," *id.* § 224(d), and attachments used "by telecommun-

ications carriers to provide telecommunications services," *id.* § 224(e). There is no corresponding statutory rate-making methodology for attachments used for purposes other than to provide cable or telecommunications services (*e.g.*, there is no rate-making methodology for attachments used to hang advertising banners or to provide electric utility service).

In *Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 (1998) ("*Implementation Order*"), the FCC relied upon its authority under Section 224 to regulate the rates charged by utilities for attachments used to provide Internet services. In addition, the FCC extended its regulation pursuant to Section 224 to include attachments used to affix wireless equipment to utility poles.

TXU Electric and a number of other utilities petitioned for review of the *Implementation Order* in several United States Courts of Appeals. These cases were consolidated in the Eleventh Circuit, which held that, because Internet service is neither a cable nor a telecommunications service, the FCC is not authorized to regulate pole attachments used to provide Internet service. *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1277-78 (11th Cir. 2000) ("*Gulf Power*"). In addition, the Eleventh Circuit concluded, reading Section 224 in its entirety, that the FCC has no authority to regulate attachments of wireless facilities. The United States and the Federal Communications Commission ("Federal Parties"), and the National Cable Television Association, Inc. ("NCTA") (collectively, "Petitioners") seek reversal of that decision.

2. Background. In order to provide reliable utility services to American consumers, TXU Electric and other utilities have invested substantial sums of money in the planning, construction, installation and maintenance of their distribution networks. The constituent parts of these networks, which may include power-generating facilities, power grids, conduits, wires and poles, are the property of the utilities.

Nonetheless, for decades, the utilities have leased, sold or otherwise provided pole attachment privileges to telecommunications providers, cable television companies, and various other entities, for use in their networks.

In 1978, Congress added Section 224 to the Communications Act, 47 U.S.C. § 224, which gave the FCC limited jurisdiction to ensure that the "rates, terms and conditions" of pole attachment agreements between utilities and operators of cable systems were "just and reasonable." Pub. L. No. 95-234, 92 Stat. 33 (1978). Section 224 was substantially modified by Congress in the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the "1996 Act").

Under the pre-1996 Act version of the statute, a copy of which is appended hereto, Section 224 governed all rates and charges for "any attachment by a cable television system." 47 U.S.C. § 224(a)(4) (1994). Pursuant to subsection (b) of the prior statute, the FCC was to regulate the rates, terms and conditions of cable system attachments and, under subsection (d) of that statute, Congress provided a specific methodology for determining whether cable system attachments were just and reasonable.

In 1989, a cable operator filed an FCC complaint against TXU Electric (formerly known as Texas Utilities Electric Company or "TUEC") arguing that TUEC was required to charge no more than the regulated rate for pole attachments used to provide non-video services. In *Heritage Cablevision Associates of Dallas, L.P. v. TUEC*, 6 FCC Rcd 7099 (1991) ("*Heritage*"), the FCC agreed, finding that Section 224, as it then read, applied to attachments by cable system operators used either for video or non-video services, so long as the services were provided on a "commingled basis over a single network within the cable operator's franchise area." *Id.* at 7107.

On review, the United States Court of Appeals for the D.C. Circuit affirmed. *Texas Utilities Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993) ("*TUEC*"). The D.C. Circuit held first that since cable services were nowhere defined in Section 224, it was "not entirely clear whether the statute place[ed] greater emphasis on the type of service to be distributed over the attachment or the type of entity doing the attaching." 997 F.2d at 930. Given this ambiguity, and even though the FCC "certainly was not able to come up with any 'hard' evidence that Congress wanted or expected the FCC to regulate pole attachments transmitting non-video communications," the court concluded that the FCC's interpretation of the statute was reasonable. *Id.* at 933.

In the 1996 Act, Congress overhauled Section 224. First, Congress expanded the provisions of Section 224(a) to encompass not only pole attachments by cable operators, but also those of "provider[s] of telecommunications service." 47 U.S.C. § 224(a)(4). In addition, subsection 224(d) was amended to make it clear that cable systems would be entitled to subsection (d) rates only for attachments used "solely to provide cable service." *Id.* § 224(d)(3). New Section 224(e) was added to provide for FCC regulation of pole attachments "used by telecommunications carriers to provide telecommunications services." *Id.* § 224(e)(1). Finally, the Communications Act was amended such that the definitions of "cable service" and "cable system," previously found only in Title VI of the Communications Act, were incorporated into the Act generally. *See* 1996 Act, Pub. L. No. 104-104, 110 Stat. 56, § 3(36) & (37).

3. The FCC Decision. In the *Implementation Order*, the FCC concluded that the 1996 Act did not "overrule" its earlier *Heritage* decision. 13 FCC Rcd at 6793-94. To the contrary, relying on the rationale accepted by the D.C. Circuit in *TUEC*, the FCC concluded that the application of Section 224 still turns upon the identity of the entity seeking

attachment rather than the nature and use of the attached facilities. *Id.* Thus, notwithstanding its conclusion that Internet service is not a "telecommunications service" under Section 224(e), and although it declined to determine whether Internet service is a "cable service," the FCC held that cable operators are entitled to the Section 224(d) cable rate for attachments used to provide Internet service. *Id.* at 6794-95. Similarly, the FCC concluded that telecommunications carriers are entitled to regulated attachment rates under Section 224 even when they affix wireless telecommunications equipment to utility poles. *Id.* at 6798-99.

4. The Eleventh Circuit Decision. In the decision below, the Eleventh Circuit held that the FCC's decision regarding its authority to regulate pole attachments used for Internet services was based on a flawed interpretation of Section 224. First, the court noted that the changes made to Section 224 in 1996 made it clear that the statute now "emphasizes the type of service" being provided on attached facilities rather than the type of entity seeking the attachment. 208 F.3d at 1276 n.32. As a result, the court found "no need to follow the reasoning of [*TUEC*]." *Id.*

Then, addressing the statute directly, the court noted that, "[f]or the FCC to be able to regulate the rent for an attachment that provides Internet service . . . , Internet service must qualify as either a cable service or a telecommunications service." *Id.* Following an extensive review of Section 224, the legislative history of the provision, and the FCC's prior treatment of Internet services, the court concluded that Internet services are not "cable services" under the Communications Act. *Id.* at 1277.[1] Further, it found no basis to

[1] "Cable service" is defined as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programmer services, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. §§ 153(6), 522(6).

question the FCC's conclusion that Internet services are not "telecommunications services."[2] In sum, "Congress . . . authorized the FCC to develop rent formulas for attachments providing cable and telecommunications services. Internet service does not meet the definition of either a cable service or a telecommunications service. Therefore, the 1996 Act does not authorize the FCC to regulate pole attachments for Internet service." *Id.* at 1277-78.

With respect to attachments used to affix wireless equipment to utility poles, the court rejected the FCC's expansive reading of Section 224(a), which would give the FCC authority to regulate any attachment made by a cable or telecommunications carrier "no matter the nature of the facility being attached." *Id.* at 1273. Instead, the court focused on the plain language of the statute and the purpose of the original Pole Attachment Act to conclude that the FCC has no authority under Section 224 to regulate the attachment of antennas or other wireless telecommunications equipment to utility property. *Id.* at 1273-75.

ARGUMENT

What an odd statute the Petitioners believe Congress to have conceived. Relying on subsections (a) and (b) of Section 224, Petitioners maintain that the FCC's authority to regulate the pole attachments of cable operators and telecommunications carriers is virtually limitless—*at least so long as the attachments are not used for services that actually fall within the FCC's ordinary jurisdiction, i.e.*, cable or telecommunications services, in which case subsections (d) and (e) of the statute constrain the FCC's rate making authority.

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[2] "Telecommunications" is defined as the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

If, on the other hand, a cable operator or a telecommunications carrier elects to affix facilities to a utility pole for some other purpose, Petitioners maintain, the FCC's authority is unfettered by statutory rate formulas. In that case, the FCC may (and indeed must, because Section 224(b) is phrased in mandatory terms) regulate the rates for the equipment so affixed, and it may use any rate-making methodology that it chooses.

Thus, in this case, Petitioners tell the Court, the FCC is required to regulate cable operator pole attachments used to provide Internet services, even though the FCC never has classified Internet service either as a cable or a telecommunications service. Similarly, Petitioners argue that the FCC's Section 224 authority extends to wireless equipment, even though such equipment never has been regarded as a "pole attachment," and the ratemaking provisions of the Act itself are phrased in terms of wireline attachments. The Eleventh Circuit properly rejected this overly broad interpretation of Section 224 and this Court should likewise.

I. SECTION 224 DOES NOT GOVERN POLE ATTACHMENTS USED TO PROVIDE INTERNET SERVICES.

Both NCTA and the Federal Parties begin by repeating the familiar principle that statutory construction begins with the language of the statute and "where the statutory language provides a clear answer, it ends there as well." Federal Parties Br. at 16; NCTA Br. at 27. NCTA and the Federal Parties, however, then proceed to ignore the clear import of all but the first two subsections of Section 224, gloss over the substantial changes made to Section 224 in 1996, and attempt to create ambiguity where none exists. Based on the ambiguity that they have read into the statute, Petitioners conclude by arguing that the Court should defer to the FCC's

interpretation of Section 224, which conferred upon itself vast authority to regulate pole attachments used to provide services that it does not otherwise regulate. Such deference is unwarranted, however, as the decision below gave effect to the plain meaning of Section 224.

A. Section 224, By Its Terms, Governs Only Attachments Used For Cable Or Telecommunications Services.

1. The Petitioners begin by arguing that the definition of a "pole attachment" in subsection 224(a)(4) does not depend upon the service being provided. The Petitioners then focus on subsection 224(b)(1), which requires the FCC to ensure that pole attachment rates are "just and reasonable." *See* Federal Parties Br. at 15-19; NCTA Br. at 27-28. At this point, Petitioners' analysis all but stops and they conclude that subsections (a) & (b) permit, and in fact require (because subsection (b)(1) is mandatory), the FCC to regulate the rates, terms, and conditions of any and all pole attachments by cable operators or telecommunications carriers without regard to the purpose of the attachment. *See, e.g.*, Federal Parties Br. at 15-16 ("if an item is an 'attachment by a cable television system'" . . . "the FCC has jurisdiction to regulate the 'rates, terms, and conditions' for it").

Subsections (a)(4) and (b)(1) of Section 224, should not, however, be read in a vacuum. It is a "cardinal rule that a statute is to be read as a whole." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). When considered in its entirety, Section 224 simply cannot accommodate the Petitioners' construction.

Subsection 224(a) defines some of the terms used in the Section. Subsection 224(a)(4), for example, defines the entities entitled to regulated rates under the statute: cable operators and telecommunications carriers. Subsection 224(b) confers upon the FCC jurisdiction to ensure that rates,

terms, and conditions of covered pole attachment agreements are just and reasonable. Subsections 224(d) and (e) expand upon subsection 224(b) by defining precisely the rate methodologies that the FCC is to use: subsection 224(d) establishes a specific formula for the rates applicable to pole attachments "used by a cable television system solely to provide cable service"; subsection 224(e) "govern[s] the charges for pole attachments used by telecommunication carriers to provide telecommunications services."

When read as a whole, each of the subsections of Section 224 offers meaning in relation to the others. Two types of services are entitled to two different rate-making methodologies, which in turn correspond to the two types of entities covered by the statute. Telecommunications carriers are entitled to the telecommunications rate for telecommunications attachments, and cable operators are entitled to the cable rate for attachments used to provide cable services. When a cable operator begins providing telecommunications services, it will be charged the same rate as its telecommunications competitors. No class of entities is favored over any other class of entities providing like-services, and the statute is internally consistent.

In its decision, the Eleventh Circuit recognized as much, noting that "[t]he straightforward language of subsections (d) and (e) directs the FCC to establish two specific just and reasonable rates, one for cable television systems providing solely cable service and one for telecommunications carriers providing telecommunications service; no other rates are authorized." *Gulf Power*, 208 F.3d at 1276 n.29.

2. For this reason, the continued reliance by the Federal Parties and NCTA on the D.C. Circuit's decision in *TUEC* is misplaced. *See* Federal Parties Br. at 22-23, NCTA Br. at 30. In *TUEC*, the D.C. Circuit affirmed the FCC's interpretation of an earlier version of Section 224. Far from finding the FCC's interpretation required by the language of the prior

version of Section 224, however, the D.C. Circuit merely acknowledged that the FCC's interpretation was reasonable given that it was "not entirely clear whether the statute place[d] greater emphasis on the type of service to be distributed over the attachment or the type of entity doing the attaching." *TUEC*, 997 F.2d at 930.

As noted above, however, there have been important changes in the text of Section 224 since the *TUEC* decision was handed down. Most importantly, it is quite clear now—as the Eleventh Circuit recognized—that the statute emphasizes the type of service being distributed over an attachment as opposed to the type of entity doing the attaching. *See* 208 F.3d at 1276 n. 32. Indeed, the Federal Parties and NCTA recognize that attachments used for different services now are entitled to different rates, even when the services are provided by the same entity. *See* Federal Parties Br. at 22-24; NCTA Br. at 34. Pole attachments used to provide telecommunications service now are entitled to the 224(e) telecommunications rate. Pole attachments used to provide cable services are entitled to the 224(d) cable rate. Pole attachments used for non-cable or non-telecommunications purposes, however, are not regulated by the FCC—even if the attaching entity happens to be a cable operator or a telecommunications carrier.

B. Petitioners Interpretation Of Section 224 Is Overly Broad.

1. Under the Petitioners' interpretation, the FCC is required by subsection 224(b)(1) to regulate all pole attachments by cable operators and telecommunications carriers, whatever the purpose of the attachment. *E.g.*, Federal Parties. Br. at 15-16, 19 ("'*Any* attachment' to a utility pole by a cable television system . . . is protected by the Act") (emphasis in original). If that were the case, the FCC's jurisdiction under Section 224 would have no

limit—the FCC would be obligated under Sections 224(a) & (b) to regulate pole attachments by a cable operator used to provide an electric utility service, or to hang advertising banners, or to mount light fixtures, even though those activities would otherwise be completely outside of the FCC's jurisdiction.

Indeed, under the Petitioners' interpretation, the FCC would have broader discretion to regulate attachments used to provide services that it normally does not regulate—such as Internet services or electric utility services—than it has to regulate attachments used for cable or telecommunications service, which are subject to the specific provisions of subsections (d) and (e). The Federal Parties, for example, argue that:

> Section 224(b)(1) expressly authorizes the FCC to ensure 'just and reasonable' rates for all items defined as 'pole attachments' in Section 224(a)(4)—even those that fall outside the categories in Section 224(d) and (e). For attachments by a cable television system that fall outside those categories, Congress has not further specified the content of the rates.

Federal Parties Br. at 26.

That is, Petitioners suppose that Congress constrained the FCC's authority to regulate the rates charged for pole attachments used to provide services that are within the FCC's jurisdiction, while requiring the FCC to regulate attachments used to provide other services, but leaving its discretion to do so unfettered. It is a familiar canon of construction that such absurd interpretations are to be avoided. *See, e.g., United States v. American Trucking Assn.*, 310 U.S. 534, 542-43 (1940); *cf. Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring in judgment) (when confronted "with a statute which, if interpreted literally, produces an absurd . . . result[,] [the Court's] task is to give some alternative meaning" to the statute).

2. Not only does Petitioners' interpretation result in an absurdity, it also renders meaningless important terms in the statute. Contrary to the odd claim that "[t]he relevant language of Section 224, as amended by the 1996 Act, is exactly the same language interpreted by the FCC in *Heritage* and affirmed by the D.C. Circuit," NCTA Br. at 40, the "relevant language" was amended in at least two important respects in 1996, eliminating the ambiguity the *TUEC* court faced.[3] As a result of these changes, the Eleventh Circuit faced, "an entirely different situation from that faced by the D.C. Circuit in [*TUEC*]." *Gulf Power*, 208 F.3d at 1276 n.32.

First, in 1996 Congress incorporated into the Communications Act generally the definitions of "cable service" and "cable system" previously found only in Section 602 of the Act. *See* 47 U.S.C § 153(7) & (8). Thus, whereas the D.C. Circuit confronted a statute in which "the congressional intent [was] far from clear" regarding the precise meaning of the important terms used in Section 224, *TUEC*, 997 F.2d at 931, there no longer can be any doubt that the terms "cable service" and "cable system" have the same meaning in Section 224 as they have in the remainder of the Act. Moreover, whereas the D.C. Circuit could not determine whether the prior version of Section 224 "place[d] greater emphasis on the type of service to be distributed over the attachment or the type of entity doing the attaching," *TUEC*, 997 F.2d at 930, the FCC's pole attachment rate making authority now is clearly phrased in terms of pole attachments used for specific and statutorily defined terms. *See Gulf Power*, 208 F.3d at 1276 n.32.

Second, Petitioners ignore the fact that subsection 224(d) was amended in the 1996 Act to provide that the "cable" rate

[3] Petitioners' suggestion, therefore, that the Eleventh Circuit decision involved an "implied repeal," NCTA Br. at 36-39, is inapposite. When Congress changes a law, courts must give effect to those changes.

methodology should apply to attachments used "solely to provide cable service." 47 U.S.C. § 224(d)(3). The addition of the word "solely" to the statute cannot be attributed to anything but a deliberate effort to limit subsection (d) rates only to attachments used for "cable services." The text could not be more clear. This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *E.g.*, *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992).

Yet, according to Petitioners, Congress did not mean what it said at all. Petitioners claim that the addition of the word "solely" to subsection (d) somehow "grandfathered" cable systems into the preexisting rate structure unless they begin to provide telecommunications service, in which case they would be subject to the (e) rate. *E.g.*, NCTA Br. at 18.[4] Thus, under the Petitioners' interpretation, subsection (d) cable rates can be applied not only to attachments used for cable services, but also to any other attachment so long as it is not used for telecommunications service. Such a construction, in which "solely" does not mean "only" and "cable service" does not have the same meaning in subsection 224(d) that it has in the remainder of the Communications Act, simply cannot be squared with the terms of the statute.[5]

[4] In making this argument, NCTA includes the word "grandfathered" within quotation marks while citing to Section 224(d)(3). NCTA Br. at 18. The term "grandfathered," however, appears nowhere in Section 224(d)(3), any other part of 224, or in the legislative history of the 1996 Amendments regarding Section 224.

[5] NCTA notes the familiar presumption that Congress is aware of previous judicial and administrative constructions when it amends a statute. *See* NCTA Br. at 28-29. That is no doubt a fair presumption, just as it is fair to say that Section 224 was amended to remedy a regulatory anomaly created by the earlier *TUEC* decision. *See* Brief of United States Telecom Ass'n, *et al.*, at 13 (policy of the 1996 Act was to end "discriminatory treatment of competitors based on what facilities they use"). Petitioners' position, however, is that Congress only did half the

No such convoluted construction of the statute is required, however, as the text accommodates a much more sensible interpretation. Congress intended for all competitors to have similar attachment rights for similar services. Telecommunications carriers are entitled to the subsection (e) telecommunications rate for pole attachments used to provide telecommunications services.[6] Conversely, cable operators are entitled to the subsection (d) cable rate for attachments used to provide cable services. However, just as others who may seek to provide non-cable or non-telecommunications services (*e.g.*, Internet service) are not entitled to regulated pole attachment rates, cable providers must pay a market rate when they enter markets for such non-covered services.

C. Petitioners Mischaracterize The Eleventh Circuit's Decision.

1. Both the Federal Parties and NCTA go to great lengths to claim that the Eleventh Circuit's decision is inconsistent with Congress's intent to "encourage the rapid development of inexpensive broadband Internet access." *See, e.g.*, Federal Parties Br. at 20. Indeed, NCTA goes so far as to claim that the Eleventh Circuit's decision would "penalize cable entities that choose to expand their services." NCTA Br. at 32.

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job because, although it leveled the field as between cable operators and telecommunications carriers, it left those two classes of entities with favored pole attachment rights vis-a-vis all others when they compete in any other market against any other class of entities. One should perhaps not presume that Congress is quite so inept.

[6] Contrary to the implication in the brief of Respondent WorldCom, Inc., the decision below does not in any way suggest that a telecommunications carrier would lose its Section 224(e) attachment rights if one of its customers provides Internet services. In that case, the attaching carrier is providing a telecommunications service to an Internet service provider.

The Court should not be misled. The decision below does not penalize cable operators who choose to compete in the Internet services market. Rather, as both NCTA and the Federal Parties recognize, there is a vibrant and rapidly growing market for the provision of high speed broadband services. *See* NCTA Br. at 7-8 ("the cable industry actively competes against numerous segments of the communications industry to provide high-speed Internet services to consumers nationwide"); Federal Parties Br. at 21 (there is a "market for broadband Internet access"). Contrary to the rhetoric in the Petitioners' briefs, the court's decision below merely puts cable operators on the same footing, *vis-a-vis* their pole attachments, as other providers of Internet services.

2. Indeed, to accept Petitioners' theory, the Court would have to believe that Congress intended to provide cable operators, while they are "actively compet[ing] against numerous segments of the communications industry to provide high-speed Internet services," with preferential pole attachment rates that are not available to non-cable Internet service providers. Although NCTA no doubt would prefer such a regulatory regime, there is no reason to believe that requiring cable operators to compete on a level field with others will discourage them from providing Internet service.

D. This FCC Avoided The Critical Issue And, Accordingly, Its Interpretation Of Section 224 Is Entitled To No Deference.

1. The Eleventh Circuit correctly held that in order to receive the regulated rate under Section 224, Internet services must be classified as either cable or telecommunications services. As the appellate court explained below, the FCC's regulatory authority under Section 224 is limited to pole attachments used to provide services that fall within the FCC's normal regulatory ambit, *i.e.*, cable and telecommunications services. The FCC may not dodge that initial definitional question, make no finding as to how a

particular service should be classified, and then assert jurisdiction over an attachment used to provide the still-undefined service simply because the attachment has been made by one of the FCC's constituents, *e.g.*, a cable operator. Finding no evidence that the FCC had defined Internet services as either a cable or telecommunications service, the appellate court refused to allow Section 224 to govern Internet service rates.

2. In order to determine the lawfulness of the FCC's assertion of jurisdiction in this case, the lower court felt obliged to engage in its own analysis of whether Internet services may be classified as either a cable or a telecommunications service. The court began by noting that, in the *Implementation Order*, the FCC itself concluded that Internet service is not a "telecommunications service." 13 FCC Rcd at 6794-95; *see also In Re* Fed.-State Joint Bd. on Universal Serv., 12 FCC Rcd 87 69 (1996) ("Internet service does not meet the statutory definition of a 'telecommunication service' under the 1996 Act"). The Eleventh Circuit said no more than that it did not question the FCC's conclusion. *Gulf Power*, 208 F.3d at 1276-77.

As to whether Internet services are cable services, the court again noted that the FCC had defined "Internet" services otherwise, *id.* at 1277 (citing *Federal-State Joint Bd. on Universal Service*, 13 FCC Rcd 11501, 66 (1998) ("Internet service providers themselves provide information services . . ."). After reviewing the statutory definitions, the Eleventh Circuit found no reason to question that determination. As various *amici* point out, the Eleventh Circuit's analysis on this issue cannot seriously be questioned since Internet is not "one-way-transmission," "'video-programming' or 'other programming'" under the definition of cable services found in Section 602 of the Act. Consumers Union Br. at 5; *see also*

USTA Br. at 19 ("cable-offered high-speed Internet access service is, at a minimum, not 'solely' a cable service").[7]

Finding no evidence that the FCC had defined Internet services either as cable or telecommunications services and no reason that it would be compelled to do so, the appellate court rejected the FCC's assertion of authority to regulate pole attachments used to provide Internet services.

3. The FCC's failure to classify Internet services also undermines Petitioners' insistence that the Court defer to the FCC's interpretation of Section 224. If this case involved a challenge to an FCC finding that Internet services should be classified as "cable services" under the Communications Act, *Chevron* deference to the agency's interpretation might be appropriate. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (courts should defer to agency interpretations of the statutes they are entrusted to administer).

Here, however, the FCC did not so much interpret the statute as attempt to write itself a new one, more to its liking, that would give the FCC authority to regulate pole attachments having nothing to do with telecommunications, cable service, or for that matter, any other service within the ambit of FCC regulation. For, if the FCC's logic were to hold, it would have the virtually unbridled authority and the duty to regulate pole attachments for the provision of electrical or other utility services every bit as much as it claims to have authority to regulate attachments for Internet services. No fair reading of the statute can justify such an expansive determination of a congressional delegation of

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[7] The Eleventh Circuit's decision on this point also is consistent with the decision of the United States Court of Appeals for the Ninth Circuit in *AT&T Corp. v. City of Portland*, 216 F.3d 871, 876-77 (9th Cir. 2000), in which that court noted that Internet service never has been found to be "cable service."

authority to the agency. The matter, moreover, of whether the statute reflects such an enormous delegation of authority to the FCC over matters unrelated to any aspect of the agency's normal regulatory responsibility or expertise, is precisely the kind of legal issue best resolved by an impartial court. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("precondition to deference under *Chevron* is a congressional delegation of administrative authority").

II. SECTION 224 DOES NOT GOVERN THE ATTACHMENT OF WIRELESS FACILITIES TO UTILITY PROPERTY.

1. For many of the same reasons set forth above, Section 224 plainly does not reach attachments for wireless equipment. In an effort to argue the contrary, the Federal Parties, and particularly the Association for Local Telecommunications Services, *et al.* ("ALTS") as *amici*, have mischaracterized the court's holding regarding antennae and other wireless equipment affixed to utility poles. For example, the Federal Parties suggest that the Eleventh Circuit's decision excludes *all* attachments by wireless telecommunications carriers from the terms of Section 224. Federal Parties Br. at 31-36; *see also* ALTS Br. at 10 ("no basis for excluding wireless telecommunications carriers" from Section 224 coverage).

Neither the statute nor the court's opinion below, however, suggests that wireless carriers have any less protection than wireline carriers—*for wireline pole attachments* as defined in Section 224(a). *See Gulf Power*, 208 F.3d at 1274-75 (affixing non-wireline equipment not a "pole attachment" as term used in Section 224). The Eleventh Circuit's decision merely recognizes that the statute does not reach wireless facilities affixed to poles *by any party*.

Indeed, as the Federal Parties concede, wireless carriers, too, sometimes require wired connections. *See* Federal

Parties Br. at 34-35. When they require such wired connections, they are afforded precisely the same pole attachment rights as any other telecommunications carrier.[8] Thus, again, it is not the identity of the party, but the nature of the attachment that determines whether or not Section 224 is applicable. With respect to wireless facilities affixed to utility property, the Eleventh Circuit properly held that, because poles most certainly are not "bottleneck facilities for wireless" equipment, and the Pole Attachment Act was never intended to reach any thing other than wireline attachments, Section 224 is inapplicable. *Gulf Power*, 208 F.3d at 1275.

2. The plain language of the statute supports the lower court's conclusion. Subsections 224(d) and 224(e), provide two specific pole attachment rate formulas, each of which involves a calculation of the "usable space" on the facilities subject to the attachment. The statute further defines "usable space" as "the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment." 47 U.S.C. § 224(d)(2). The statutory rate formulas provide no guidance as to how utilities (or the FCC) are to apportion costs or establish rates for the attachment of wireless equipment to utility property—wireless facilities simply are not contemplated by the statute.

3. Unable to refute the inherent logic of the Eleventh Circuit's decision or to deny the specific intent of Congress as evidenced by the statutory text, ALTS mistakenly suggests that utility poles are an essential facility for wireless equipment siting. *See* ALTS Br. at 16-18. That suggestion

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[8] The Federal Parties suggest that there is some dispute on this point. *See* Federal Parties Br. at 35 ("perhaps the decision [below] may be construed not to exclude a wireless carrier's wireline facilities from the scope of Section 224"). In fact, no party ever has contested the proposition that wireless carriers are entitled to Section 224(e) rates for their wireline telecommunications attachments.

does not bear the test of common sense. Whatever one may believe regarding the use of utility poles for wireline facilities, utility poles most assuredly are not essential for wireless equipment. Federal and state governments, private building owners, and tower owners—including telecommunications carriers themselves—all lease space on their structures for wireless facilities.[9] Yet none of these other entities is subject to any restriction on the rates that they may charge for the installation of wireless equipment. No cogent theory has been offered as to why Congress would have singled out utilities for such a restriction.

CONCLUSION

The decision of the United States Court of Appeals should be affirmed.

Respectfully submitted,

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June 5, 2001

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[9] *See, e.g., NPS Turning Page In Saga Of Tower Siting On Federal Property*, Mobile Phone News (July 6, 1998) ("GSA has signed leases with industry to place antennas on the rooftops of 67 government-owned buildings for annual fees totaling more than $1 million"); *Rooftop Siting Requires Landlords To Develop Telecom Knowledge*, Radio Communications Report (May 15, 2000) ("rooftops have grown increasingly desirable in recent years" for antenna siting); *Tower Construction Enjoys Growth Spurt*, Radio Communications Report (July 24, 2000) (tower owners "riding the wave of the booming wireless market").

APPENDIX

APPENDIX

47 U.S.C. § 224 (1994). Regulation of Pole Attachments

(a) As used in this section:

(1) The term "utility" means any person whose rates or charges are regulated by the Federal Government or a State and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communication. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

(2) The term "Federal Government" means the Government of the United States or any agency or instrumentality thereof.

(3) The term "State" means any State, territory, or possession of United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

(4) The term "pole attachment" means any attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

(b) (1) Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedure established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312(b) of title III of the Communications Act of 1934, as amended.

(2) The Commission shall prescribe by rule regulations to carry out the provisions of this section.

(c) (1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions for pole attachments in any case where such matters are regulated by a State.

(2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that—

(A) it regulates such rates, terms, and conditions; and

(B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of cable television services, as well as the interests of the consumers of the utility services.

(3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments—

(A) unless the State has issues and made effective rules and regulations implementing the State's regulatory authority over pole attachments; and

(B) with respect to any individual matter, unless the State takes final action on a complaint regarding such matter—

(i) within 180 days after the complaint is filed with the State, or

(ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

(d) (1) For purposes of subsection (b) of this section, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

(2) As used in this subsection, the term "usable space" means the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment.

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IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, *et al.*,

Petitioners,

v.

GULF POWER COMPANY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENTS AMERICAN ELECTRIC POWER SERVICE CORPORATION, COMMONWEALTH EDISON COMPANY, DUKE ENERGY CORPORATION, ALABAMA POWER COMPANY, GEORGIA POWER COMPANY, GULF POWER COMPANY, MISSISSIPPI POWER COMPANY AND SAVANNAH ELECTRIC POWER COMPANY

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether 47 U.S.C. § 224 grants the Federal Communications Commission ("FCC") jurisdiction to regulate pole attachments that are simultaneously used to provide high-speed Internet access and conventional cable television programming.

2. Whether 47 U.S.C. § 224 grants the FCC jurisdiction to regulate attachments of wireless telecommunications equipment.

RULE 29.6 STATEMENT

Respondents Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company and Savannah Electric Power Company are wholly-owned subsidiaries of the Southern Company.

Respondent American Electric Power Service Corporation is a wholly-owned subsidiary of American Electric Power Company, Inc.

Respondent Commonwealth Edison Corporation is wholly-owned subsidiary of Exelon Corporation.

Respondent Duke Energy Corporation has no parent or publicly-owned company owning 10% or more of the corporation's stock.

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COUNTERSTATEMENT OF THE CASE

The Pole Attachments Act, Pub. L. No. 95-234, § 6, 92 Stat. 35 (codified as amended at 47 U.S.C. § 224) was enacted in response to a perceived danger of anti-competitive practices by utilities in connection with cable television service. *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987). Cable companies had complained there were no practical alternatives to stringing their cables on utility poles, and that some utilities (principally telephone companies) had exploited their "monopoly" position over these "bottleneck facilities" by charging excessive rates for pole attachments. S. Rep. No. 95-580, at 13 (1977), *reprinted in* 1978 U.S.C.C.A.N. 109, 121. (Addendum A at 5a-6a (hereinafter "Add.")). To address these complaints, and to assist the cable industry (which was then in its infancy), Congress granted jurisdiction to the FCC to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. § 224(b)(1).[1] At the time, both the Administration and Congress expressed concern about granting jurisdiction to the FCC to regulate electric utility companies. H.R. Rep. No. 94-1630, at 33, 34 (1976) (Add. B at 60a-61a), H.R. Rep. No. 95-721, pt. 2, at 10, 12 (1977) (Add. C at 83a, 85a); 123 Cong. Rec. 14,974 (May 17, 1977) (statement by bill's sponsor, Sen. Ernest Hollings) (Add. D at 89a-90a). The Senate Report that accompanied the legislation explained that the FCC's new jurisdiction would be "strictly circumscribed" and triggered only "where space on a utility pole has been designated and is actually being used for communications by wire or cable." S. Rep. No. 95-580, at 15, *reprinted in* 1978 U.S.C.C.A.N. 109, 123 (Add. A at 9a).

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[1] A specific grant of jurisdiction was necessary because, as the FCC itself recognized, the FCC had no jurisdiction under existing law to regulate pole attachments. *California Water & Tel. Co.*, 64 F.C.C.2d 753, 758 (1977); *FCC v. Florida Power Corp.*, 480 U.S. at 248 n.1.

Congress implemented this jurisdictional restriction in three specific ways. First, it defined a "utility" subject to the statute as "a person . . . who owns or controls poles, ducts, conduits or rights of way used, in whole or in part, for wire communications." 47 U.S.C. § 224(a)(1). Second, it defined the "usable space" on a pole as "the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment." 47 U.S.C. § 224(d)(2). Third, the Act established strict boundaries on the Commission's exercise of its authority to determine "just and reasonable" rates for pole attachments, the lower end being the "additional costs of providing pole attachments," the upper end being the "fully-allocated costs" associated with the portion of the "usable space" attributable to the pole attachment. 47 U.S.C. § 224(d)(1).

An earlier version of the legislation would have granted the FCC jurisdiction to regulate "any attachment *for wire communication*," but was changed in the final bill at the behest of the FCC to "any attachment by *a cable television system*." H.R. Rep. No. 94-1630, at 2, 30 (Add. B at 29a, 53a-54a). As finally adopted, the Act was narrowly tailored to provide regulated rate coverage only to the cable industry, not to other entities (such as Western Union or the local telephone company) that attach wireline facilities to utility poles. H.R. Rep. No. 104-204, at 91 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 58 (noting that Section 224 was intended "to spur the growth of the cable industry").

In the late 1980's, cable companies began to provide services other than conventional video programming. In 1991, the FCC ruled that cable companies that provided commingled cable and other non-video services over the same coaxial cable were entitled to a single, regulated rate under the Pole Attachments Act. That rule was upheld by the D.C. Circuit in *Texas Utilities Electric Co. v. FCC*, 997 F.2d 925, 927 (D.C. Cir. 1993).

The *Texas Utilities* decision, issued five months before the introduction of the first version of what was later to become the Telecommunications Act of 1996, created a regulatory anomaly. At the time, cable operators were expected to move aggressively into the local telephone market; this was one of the motivating factors behind the new legislation. S. Rep. No. 104-23, at 3 (1995) ("Telephone companies are seeking the right to provide cable service in competition with cable companies. Similarly, cable companies are seeking the right to provide telephone service."); H.R. Conf. Rep. No. 104-458, at 148 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 160 ("Some of the initial forays of cable companies into the field of local telephony therefore hold the promise of providing the sort of local residential competition that has consistently been contemplated."). Under *Texas Utilities*, however, cable companies that provided telecommunications services were entitled to regulated rates for their pole attachments, while telecommunications carriers providing the same telecommunications services were not.

Congress addressed this regulatory anomaly by adding telecommunications carriers to Section 224 coverage as part of the larger Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. Congress accomplished this by expanding the definition of pole attachment from "any attachment by a cable television system" to "any attachment by a cable television system *or provider of telecommunications service*." 47 U.S.C. § 224(a)(4) (1994 & Supp. IV 1998) (emphasis added). The 1994 Senate Report accompanying the legislation explains this change was "intended to remedy the anomaly of current law, under which cable systems providing telecommunications services are able to obtain a regulated pole attachment rate under Section 224 of the 1934 Act, while other providers of telecommunications services are unable to obtain a regulated pole attachment rate under Section 224." S. Rep. No. 103-367, at 65 (1994); *see also* H.R. Conf. Rep. No. 104-458, at 206 (1996), *reprinted in*

1996 U.S.C.C.A.N. 10, 200.[2] Congress did not extend Section 224 coverage to *all* telecommunications carriers, but rather excluded incumbent local exchange carriers. 47 U.S.C. § 224(a)(5) ("[f]or the purposes of this section, the term 'telecommunications carrier' * * * does not include any incumbent local exchange carrier"). Incumbent local exchange carriers continue to pay pole attachment rates well in excess of the low regulated rates paid by cable companies and telecommunications carriers.[3]

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[2] The purpose behind the 1996 amendments was *not*, as the FCC stated in the rulemaking below and Petitioner National Cable Television Association ("NCTA") repeats in its brief, "to remedy the inequitable position between pole owners and those seeking pole attachments," Gov't Pet. App. 86a, 13 F.C.C.R. 6777, 6794 ¶31, NCTA Br. at 31. The purpose was to remedy the inequitable position between cable companies providing telecommunications service and telecommunications companies providing telecommunications service.

[3] Petitioners assert that incumbent LECs were excluded from § 224 coverage because "there was no need to provide rate protection to entities that usually owned or controlled the poles themselves." Fed. Pet. Br. at 18. The implication that incumbent LECs own or control all of the poles they use to string their wires is untrue. ILECs typically own less than half of the poles in any service area, and in some regions, less than 20%. The common term "telephone pole" is largely a misnomer; in the majority of cases, incumbent LECs do *not* own or control the poles to which they attach.

Congress excluded incumbent LECs from Section 224 coverage because they were not a fledgling industry that Congress wanted to promote through subsidized pole attachment rates. The Telecommunications Act of 1996 was principally aimed at fostering competition to the incumbent LECs in the local telephone markets. *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 416 (1999). The core provisions of the Act are designed to help other carriers to compete with incumbent LECs by accessing the incumbent LECs' networks. The evident purpose of extending Section 224 coverage to these new carriers and not to incumbent LECs was to provide a financial advantage to the new entrants to help them compete in the local telephone markets.

Congress also made a number of other important changes to the Pole Attachments Act in 1996. These include the following:

First, whereas this Court had held in *FCC v. Florida Power Corp.*, 480 U.S. 245, 251 (1987) that access to utility poles under the 1978 Act was *voluntary* and thus not a taking under the Fifth Amendment, Congress made access *mandatory* by adding a new Section 224(f)(1), which provides that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. § 224(f)(1) (Supp. IV 1998).[4]

Second, Congress prescribed a second pole attachment rate to be established by the FCC. Before 1996, Section 224(d) had set forth a single standard for determining "just and reasonable" rates for attachments by a cable television system. In 1996, Congress provided that the Section 224(d) standard "shall apply to the rate for any pole attachment used by a cable television system *solely to provide cable service*." 47 U.S.C. § 224(d)(3) (Supp. IV 1998) (emphasis added). Congress also provided that the Commission "shall * * * prescribe regulations in accordance with" a different standard "to govern the charges for pole attachments used by *telecommunications carriers* to provide *telecommunications services*." 47 U.S.C. § 224(e)(1) (Supp. IV 1998) (emphasis

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[4] In a ruling not at issue in this appeal, the court below held that the new mandatory access provisions of Section 224(f)(1) effect a taking of utility property under the Fifth Amendment to the U.S. Constitution. Gov't Pet. App. at 18a, 208 F.3d at 1272. The court went on to hold, however, that the question of whether the FCC's rate formula provides just compensation was not yet ripe. Gov't Pet. App. at 19a, 208 F.3d at 1272. Cases challenging the constitutionality of the FCC's rate formula in the context of specific pole complaints currently are pending in the Eleventh Circuit. *Alabama Power Co. v. FCC*, No. 00-14753 and consolidated cases (11th Cir. *filed* September 13, 2000).

added). Much as it had with cable attachments, Congress placed strict boundaries around the FCC's discretion to determine "just and reasonable" rates for telecommunications attachments. 47 U.S.C. § 224(e).

Significantly, several parts of Section 224 remained intact. The 1996 amendments did not change the Act's jurisdictional restriction to utilities which own or control facilities "used, in whole or in part, for any *wire communications*." 47 U.S.C. § 224(a)(1). Nor did Congress change the definition of "usable space" as "the space above the minimum grade level which can be used for the attachment of *wires, cables, and associated equipment*." 47 U.S.C. § 224(d)(2). Indeed, Congress specifically made the concept of "usable space" applicable to attachments for "telecommunications carriers" through the new rate formula established in Section 224(e).[5]

To date, the FCC has implemented the 1996 amendments to the Pole Attachments Act in four separate rulemaking proceedings. This case involves one of those rulemaking proceedings. *In re Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole Attach-*

[5] The new Section 224(e) provides, in pertinent part:

* * * *

(2) A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the *usable space* among entities so that such apportionment equals two-thirds of the costs of providing space other than the *usable space* that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

(3) A utility shall apportion the cost of providing *usable space* among all entities according to the percentage of *usable space* required for each entity.

47 U.S.C. § 224(e).

ments, 13 F.C.C.R. 6777 (1998); Gov't Pet. App. D.[6] As pertinent here, the FCC determined that cable operators are entitled to the benefits of Section 224 when providing commingled Internet and cable services. The FCC based this conclusion on the ground that it "is still obligated under Section 224(b)(1) to ensure that the 'rates, terms, and conditions [for pole attachments] are just and reasonable,' and, as Section 224(a)(4) states, a pole attachment includes 'any attachments by a cable television system.'" Gov't Pet. App. at 90a, 13 F.C.C.R. at 6796 ¶34. Further, the FCC determined that the "just and reasonable rate for commingled cable and Internet service is the Section 224(d)(3) rate," Gov't Pet. App. at 87a, 13 F.C.C.R. at 6794 ¶32, notwithstanding Section 224(d)(1)'s mandate that this rate shall apply to attachments used "solely to provide cable service." 47 U.S.C. § 224(d)(3) (Supp. IV 1998). The Commission explained that its decision was based solely on its regulatory authority under Section 224(b)(1), Gov't Pet. App. at 87a, 13 F.C.C.R. at 6794 ¶33, and not on a determination of whether Internet service was a "cable service" or a "telecommunications service" under Section 224(d) or 224(e). The Commission stated it "need not decide at this time * * * the precise category into which Internet services fit," Gov't Pet. App. at 89a, 13 F.C.C.R. at 6795 ¶34, although it noted it had concluded in an earlier proceeding that "Internet service is not the provision of a telecommunications service under the 1996 Act." Gov't Pet. App. at 87-88a, 13 F.C.C.R. at 6795 ¶33.

The Commission made one other holding in the rulemaking relevant here. It determined that the 1996 amendments extend the "benefits and protections" of Section 224 to

[6] The FCC has completed one other rulemaking, which currently is on review in the Eleventh Circuit. *Southern Co. v. FCC*, No. 99-15160-GG and consolidated cases (11th Cir. *filed* Dec. 16, 1999) (oral argument scheduled Aug. 28, 2001).

attachments of wireless telecommunications equipment. Gov't Pet. App. at 94a, 13 F.C.C.R. at 6798 ¶39.

Electric utility companies filed petitions for review of the FCC's order in the Third, Fourth, Sixth, Eighth, Eleventh, and D.C. Circuits. Pursuant to the FCC's motion, the cases were consolidated in the Eleventh Circuit. The panel reversed the FCC's conclusions that the Pole Attachments Act, as amended in 1996, covers attachments used for commingled cable and Internet service. The panel also reversed the FCC's determination that the Act covers attachments of wireless telecommunications equipment. Petitions for rehearing *en banc* were denied. Petitions for a writ of certiorari were filed by the Government and the NCTA. The Court granted both petitions on January 22, 2001 and ordered the cases consolidated.

SUMMARY OF ARGUMENT

The FCC has regulated an unregulated service (cable Internet service) and an unregulated market (for siting wireless telecommunications equipment) solely for purposes of Section 224. These result-oriented decisions, which grant "subsidized" pole attachment rates to some of the FCC's largest constituents (cable companies and wireless carriers) at the expense of electric utility ratepayers, are beyond the scope of the regulatory power granted by Congress. If Petitioners wish for cable Internet service and wireless telecommunications equipment to be brought within the ambit of pole attachment regulation, their proper appeal is to Congress to change the existing law, not to this Court.

1. In Section 224(b)(1), Congress granted the FCC the power to regulate the "rates, terms, and conditions" of pole attachments to ensure that such "rates, terms and conditions" are "just and reasonable." In Sections 224 (d) and (e), Congress established highly detailed standards to circumscribe the FCC's exercise of its power to establish rates for

pole attachments for two types of service: cable service, which is regulated more broadly under Title VI of the Communications Act, and telecommunications service, which is regulated under Title II. 47 U.S.C. §§ 224(d), (e). Subsections (d) and (e) define and limit the FCC's regulatory power; no other rates are authorized. Congress cannot reasonably be presumed to have provided these detailed standards to define the exercise of the FCC's power to regulate pole attachment rates for cable and telecommunications services, yet to have provided a virtually unlimited power to regulate pole attachment rates for other services (cable Internet services) that the FCC does not otherwise regulate. Congress' grant of power to regulate pole attachment rates cannot rationally be understood to actually *expand* when the services provided over an attachment fall outside the FCC's broader regulatory jurisdiction under the Communications Act.

Petitioners' textual argument rests on the claim that "any attachment by a cable television system" in 47 U.S.C. § 224(a)(4) means "any attachment by a cable television *company*." This argument fails, however, since in 1996 Congress extended the statutory definition of "cable system" to Title II of the Communications Act, which includes Section 224. 47 U.S.C. § 522(7); 47 U.S.C. § 153(7). This definition provides that a "cable system" refers to a set of facilities, not the owner of the facilities, and limits the facilities to traditional cable service where the owner is otherwise regulated by the FCC as a common carrier. 47 U.S.C. § 522(7). Most major cable companies are regulated as common carriers because they provide cable telephony to residential and business customers. Thus, "any attachment by a cable system" means any attachment by facilities used to deliver traditional video programming.

The court of appeals' holding below is fully consistent with Congress' policy pronouncements in the 1996 Act. While

Congress declared a national policy to encourage deployment of the Internet, 47 U.S.C. §§ 157, statutory note, 230(b)(1), Congress also declared that the Internet should be "unfettered by Federal or state regulation." 47 U.S.C. § 230(b)(2). Petitioners' argument that Congress *must* have intended to subsidize cable Internet is based on the faulty logic that a Congressional desire to promote a particular segment of the economy *automatically* translates into a federal subsidy program. There is no support for this assumption, especially given that it would translate into Congress picking winners and losers in the marketplace—in this case, by providing subsidized pole attachments to cable operators for Internet service while denying it to incumbent local exchange carriers, cable's major competitors in the delivery of Internet service.

The rate formulas contained in Sections 224 (d) and (e) are mandatory, not discretionary, and thus compel a decision as to whether cable modem service is a cable service or a telecommunications service. The court of appeals was correct that it is neither. Clearly, it is not a "cable service," the essence of which is the one-way transmission of programming to subscribers, rather than interactive and individual transmission like the Internet. Moreover, it is not a "telecommunications service," despite the appeal of the argument that Internet access service delivered by a cable company should be regulated in the same manner (as a "telecommunications service") as Internet access service delivered by a local exchange carrier. The FCC has already concluded that Internet access is an "information service," not a "telecommunications service," and that Internet access service does not become a "telecommunications service" merely by virtue of the fact that it is offered to customers through a telecommunications pipeline.

2. The court of appeals' holding that Section 224 does not cover wireless telecommunications equipment is also correct. When the Pole Attachments Act was passed in 1978,

Congress made clear that the expansion of FCC jurisdiction was "strictly circumscribed" and limited to dealing with arrangements affecting the "communications space" on utility poles, that is, the space used for the attachments *of wires, cables and associated equipment*. Congress implemented this jurisdiction limitation in the definition of "utility" in Section 224(a)(1) ("a person * * * who owns or controls poles, ducts, conduits or rights-of-way used, in whole or in part, for *wire communications*") and in the definition of the "usable space" on the pole in Section 224(d)(2) ("the space above the minimum grade level which can be used for the attachment of *wires, cables, and associated equipment*"). The concept of "usable space" was incorporated into the standard established in Section 224(d) for attachments by a cable television system.

In 1996 Congress did not change the Act's limitation to the wireline communications space. The definition of "utility" remained unchanged, as did the definition of "usable space." Indeed, the concept of "usable space" (with its limitation to wires, cables and associated equipment) was incorporated into the new statutory formula for telecommunications attachments. 47 U.S.C. § 224(e). Congress cannot have intended Section 224(e) to cover wireless telecommunications equipment when it defined the ratemaking formula for telecommunications attachments in terms of wires, cables and associated equipment.

Congress did not utter a word about siting wireless equipment in Section 703 of the 1996 Act, which amended Section 224. Congress did, however, address the topic at length in the next section of the 1996 Act, which established a "National Wireless Telecommunications Siting Policy." 47 U.S.C. § 332. The court of appeals is correct that the extensive discussion of wireless siting in Section 704, coupled with Section 703's silence on the subject, indicates that Congress did not intend the Pole Attachments Act to cover wireless telecommunications equipment.

This conclusion is supported by the fact that utility poles are not bottleneck facilities for wireless equipment. A thriving free market exists for siting wireless equipment, on towers, on monopoles, on rooftops, on billboards, etc. These unregulated sites typically command rental rates of $1,500 to $2,000 a month, while a regulated pole attachment rate is about $6 a year. Congress surely cannot be presumed to have taken the dramatic step of regulating a tiny segment of the wireless siting market in Section 224 without a word, particularly given its extensive discussion of the subject elsewhere in the same statute.

ARGUMENT

I. SECTION 224 DOES NOT APPLY TO ATTACHMENTS USED FOR DELIVERY OF COMMINGLED CABLE AND INTERNET SERVICE.

The case against Petitioners can be couched in the form of a *reductio ad absurdum* argument, starting with the FCC's absurd result: that notwithstanding Congress' explicit command that the Section 224(d) rate applies to attachments used "solely to provide cable service," attachments for commingled cable and Internet service are entitled to the Section 224(d) rate. Gov't Pet. App. 89a-90a, 13 F.C.C.R. at 6795-6796 ¶34. Since cable modem service is not a "cable service," this holding is directly contrary to the plain language of the statute and cannot be sustained.

The FCC has reached this absurd result—a result so embarrassing it is relegated to a footnote in the Government's brief, Govt. Br. at 26 n.10—because of the FCC's stubborn refusal to rule on the proper regulatory treatment of cable modem service. To be sure, the regulatory treatment of cable modem service has ramifications far beyond the world of pole attachments. Nonetheless, the FCC's insistence on avoiding this decision—coupled with its desire to favor its communications constituents (cable companies) with cheap pole attachment rates at the expense of electric utility ratepayers—has led it to a tortured reading of Section 224. The absurd result is a clear indication that *something*, at least, is wrong with the FCC's reading of the statute.

A. Sections 224(d) and (e) Define And Limit The FCC's Ratemaking Power.

This case involves four subsections of the Pole Attachments Act. The first is Section 224(b)(1)'s grant of power to the FCC to regulate the "rates, terms and conditions for pole attachments." The second is Section 224(a)(4)'s definition of "pole attachment" as "any attachment by a cable television system or provider of telecommunications service." The third and fourth are the specific standards defining and limiting the manner in which the FCC can exercise its Section 224(b)(1) regulatory power: Section 224(d) for "any attachment used by a cable television system *solely to provide cable service*;" and Section 224(e) for "pole attachments used by *telecommunications carriers* to provide *telecommunications services*."

Petitioners' central argument is that the FCC's grant of power in Section 224(b)(1) to regulate pole attachments can be decoupled from the specific standards Congress established for the exercise of that power in subsections (d) and (e). This piecemeal reading of the statute violates the "cardinal rule" that a statute must be read as a whole. *King v. St. Vincents Hosp.*, 502 U.S. 215, 220 (1991). Congress *defined and limited* the FCC's general grant of power to set "just and reasonable rates" for pole attachments through the specific standards set out in subsections (d) and (e) for attachments used for cable service and telecommunications service. As the court held below:

> The straightforward language of subsections (d) and (e) directs the FCC to establish two specific just and

> reasonable rates, one for cable television systems providing solely cable service and one for telecommunications carriers providing telecommunications service; *no other rates are authorized.*

Gov't Pet. App. at 27a; 208 F.3d at 1276 n.29 (emphasis added).

Congress established highly detailed standards in subsections (d) and (e) to define and limit the FCC's exercise of its power to establish just and reasonable rates for cable and telecommunications attachments. Congress cannot reasonably be assumed to have provided these highly detailed standards for the Commission's exercise of its power to set rates for cable and telecommunications attachments, yet to have provided an entirely *unbounded* power to the Commission to set just and reasonable rates for *other* services (including Internet services).[7] There is nothing in the text or the legislative history that would support such a reading.

The FCC acknowledges that prior to 1996, Section 224 set "a single regulated rate for pole attachments" (the "Cable Rate") that "*must* fall within the parameters established by Section 224(d)(1)." *Heritage Cablevision Assocs. v. Texas Utils. Elec. Co.*, 6 F.C.C.R. 7099, 7106 ¶32 (1991) (emphasis added). According to the FCC, Section 224 made "no

[7] This conclusion is supported by the familiar principal of statutory construction which holds that "the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander v. Sandoval*, 149 L. Ed. 2d 517, 2001 U.S. LEXIS 3367, *28 (2001); *see also Northwest Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77, 93-94 (1981) ("[T]he comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional remedies."). Surely the express provision of detailed sets of standards in subsections (d) and (e) for cable and telecommunications services suggests that Congress intended to preclude regulation of attachment rates for other types of services.

provision for disparate rates based on the type of service provided." *Id.* at 7106 ¶31. Rather, Section 224 "permit[ted] a single, regulated, just and reasonable rate for pole attachments." *Id.*

In 1996, Congress amended Section 224 to cover telecommunications companies. In doing so, Congress sought to level the playing field between cable companies providing telecommunications services and competing telecommunications companies providing the same services. Congress provided an additional rate for "pole attachments used by telecommunications carriers to provide telecommunications services." 47 U.S.C. § 224(e) (the "Telecom Rate"). As it had done in 1978 with regard to the Cable Rate, Congress again specifically limited the FCC's discretion in setting the Telecom Rate by defining what satisfies the "just and reasonable" standard. 47 U.S.C. § 224(e). There are two rates under the Act and two rates only.

This conclusion is underscored by the restrictions Congress placed on the FCC's ratemaking power elsewhere in the Telecommunications Act of 1996. In Section 252(d)(1), Congress granted the FCC power to prescribe standards for rates to be charged for new entrants to interconnect with, or lease elements of, incumbent LECs' existing networks.[8] As in Section 224, Congress did not grant this power under an unqualified "just and reasonable" standard, but rather specifically prescribed that the rates must be "based on the cost . . . of providing" interconnection or the network element. 47 U.S.C. §§ 251(c)(3), 252(d)(1). Congress further qualified this power by requiring that these rates be

[8] Challenges to the FCC's TELRIC rules implemented pursuant to this authority were granted by this Court on the same day the Court granted cert. in the instant cases. *Verizon Communications, Inc. v. FCC*, Nos. 00-511, 00-555, 00-590 and 00-602 (*cert. granted* Jan. 22, 2001).

"determined without reference to a rate-of-return or other rate-based proceeding" of the kind that had traditionally been used to set the incumbents' local retail rates. 47 U.S.C. § 252(d)(1)(A)(i). The fact that Congress did not grant the FCC ratemaking power under a bare "just and reasonable" standard in the interconnection provisions of the 1996 Act supports the notion that Congress did not grant the FCC power to set rates under a bare "just and reasonable" standard elsewhere in the same statute.[9]

This reading also is consistent with the larger structure of the Communications Act of 1934, which provides separate and comprehensive schemes of regulation for cable service (Title VI) and for telecommunications service (Title II). A service that does not fit into one of these regulatory boxes is unregulated. It is only natural for Congress to require that a service must be regulated generally (either under Title VI as a cable service or Title II as a telecommunications service) in order to be subject to regulation for pole attachment purposes.

B. The FCC Cannot Avoid Classifying Cable Modem Service.

Another reason the FCC's tortured approach to Section 224 is unreasonable is that subsections (d) and (e) are mandatory,

[9] Congress' use of the "just and reasonable" standard traces its origin to the Interstate Commerce Act of 1887, 24 Stat. 379 (1887), through which Congress created the Interstate Commerce Commission and granted it the power to set "just and reasonable" rates for railroads. *See generally* Joseph D. Kearney, *The Great Transformation of Regulated Industries Law*, 98 Colum. L. Rev. 1323 (1998). This Court has held the "just and reasonable" standard bestows a virtually unlimited power to set rates. *See FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602, 611 (1944); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310 (1989). In the Telecommunications Act of 1996, Congress chose not to grant the FCC ratemaking power under the historical "just and reasonable" standard (with all the unbridled discretion that entails), but instead provided detailed guidance for the Commission's exercise of its ratemaking power.

not discretionary. Section 224(d)(3) says "[t]his subsection *shall* apply to the rate for any pole attachment used by a cable television system to provide cable service." 47 U.S.C. § 224(d)(3) (emphasis added). Section 224(e)(3) states: "The Commission *shall* * * * prescribe regulations in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services." 47 U.S.C. § 224(e)(3) (emphasis added). The FCC admits that these rates are mandatory:

> We note that in the one case where Congress affirmatively wanted a higher rate for a particular service offered by a cable system, it provided for one in section 224(e). In requiring that the Section 224(d) rate apply to any pole attachment used 'solely to provide cable service,' we do not believe Congress intended to bar the Commission from determining that the Section 224(d) rate methodology also would be just and reasonable in situations where the Commission is not *statutorily required to apply the Section 224(e) rate.*

Gov't Pet. App. at 90a, 13 F.C.C.R. at 6796 ¶34 (emphasis added). At the very least, therefore, it is far more natural to read the statute as asking the Commission first to determine whether the mandatory rates prescribed by subsections (d) or (e) apply, since, if they do, that is the end of the matter and there is no need to determine whether the Commission has discretion to set rates for services that hypothetically might fall outside of the "cable service" or "telecommunications service" classifications. The Commission's explicit refusal to undertake this analysis[10] underscores the capriciousness of its ruling.

[10] "We need not decide at this time, however, the precise category into which Internet services fit. Such a decision is not necessary in order to determine the pole attachment rate applicable to cable television systems

Ironically, the implausibility of severing the Commission's general grant of regulatory power under Section 224(b)(1) from the implementing standards set out in subsections (d) and (e) is underscored by the Commission's very attempt to exercise its Section 224(b)(1) power. The Commission undertook its analysis in two steps. First, it determined whether it had the power to regulate commingled cable and Internet attachments, then it considered what rate would apply. In the first step, the Commission bifurcated the statute and determined that Section 224(b)(1), standing alone, empowers it to regulate commingled cable and Internet attachments. In the second step, however, the FCC yoked the statute back together, turning to the specific standards established by Congress to conclude that the "just and reasonable rate for commingled cable and Internet service is the Section 224(d)(3) rate." Gov't Pet. App. at 87a, 13 F.C.C.R. at 6796 ¶32. Setting aside that the Section 224(d)(3) rate applies to attachments *solely to provide cable service* (which commingled cable and Internet attachments are not), this exercise shows that in practice, the FCC found itself compelled to use the standard set by Congress in Section 224(d) to implement its Section 224(b)(1) power. The Act is no more severable as a practical matter than it is as a matter of law.

C. A "Cable Television System" Is Not Synonymous With A Cable Company.

Petitioners' textual argument rests entirely on the proposition that "[a]n attachment by a cable television system that is used to provide commingled cable television service and Internet access is an attachment 'by a cable television system' as that term is used in 47 U.S.C. § 224(a)(4)." Gov't Br. at 11. This argument in turn rests on the assumption that

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using pole attachments to provide traditional cable services and Internet services." Pet. App. 89a, 13 F.C.C.R. at 6795 ¶34.

"cable television system" refers to a cable *company*, and thus that anything a cable company attaches to a pole is a "pole attachment" for purposes of Section 224.

This argument does not withstand scrutiny. Congress defined the term "cable system" in the Cable Act of 1984 to refer to a set of facilities, *not* the operator of the facilities:

> [T]he term "cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include * * * * (C) any facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act, except that such facility shall be considered a cable system * * * * to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services.

47 U.S.C. § 522(7).[11] "Cable operator" is separately defined, 47 U.S.C. § 522(5), as is "cable service," 47 U.S.C. § 522(6).

Prior to the 1996 Act, the "cable system" definition applied only to Title VI of the Communications Act, not to Title II (which includes Section 224). In 1996, however, Congress extended the "cable system" definition to the Communications Act as a whole (including, of course, Section 224). 47 U.S.C. § 153(7).

Thus a "cable system," as that term is defined and used in Section 224(a)(4),[12] refers to a set of facilities operated by a

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[11] The FCC has issued regulations defining the terms "cable system" and "cable television system" with the same language Congress used in 47 U.S.C. § 522(7). 47 C.F.R. § 76.5(a) (2000).

cable company, not to the cable company itself; and if the cable company is regulated as a common carrier, then its facilities are a "cable system" *only to the extent they are used to transmit video programming*. 47 U.S.C. § 522(7). In other words, if a cable company provides telecommunications service and thus is regulated by the FCC as a common carrier, then its network is deemed to be a "cable system" only to the extent it is used to transmit traditional cable service. This distinction in the "cable system" definition (47 U.S.C. § 522(7)) tracks directly with the distinction between attachments used *solely to provide cable service* and attachments used to provide *tele-communications service* in 47 U.S.C. §§ 224 (d) and (e).

In fact, most major cable companies are now common carriers subject, in part, to the provisions of Title II, through the delivery of residential and/or commercial telephone service over the cable company's fiber optic network. Petitioner NCTA's January 2001 Cable Television Handbook, which can be downloaded from NCTA's web site, acknowledges that "[t]he cable industry is now expanding its competitive offerings to include business and residential telephone as well as data services." NCTA, *Cable Television Handbook* 6-D-1 (2001), *available at* http://www.ncta.com/pdf_files/Handbook-Total.pdf. The Handbook notes that "[a]t least nine of the nation's largest multiple system operators (MSOs) now offer residential and/or commercial phone service in more than 45 markets overall, and companies have reached interconnection agreements in 40 states and the District of Columbia."[13]

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[12] Section 224(a)(4) uses the term "cable television system," not "cable system," but as noted at note 10, *supra*, the FCC's regulations treat these two terms as synonymous. 47 C.F.R. § 76.5(a).

[13] The nine cable companies include Adelphia Business Solutions/Hyperion, Cablevision Systems, Cablevision Lightpath, Comcast Cable, Cox Communications, Cox Fibernet, AT&T Broadband,

Where cable companies are common carriers, their facilities are "cable systems" only to the extent they are "used in the transmission of video programming directly to subscribers" under 47 U.S.C. § 522(7). Since Internet access provided by cable modem service clearly is not the transmission of video programming directly to subscribers, Petitioners' textual argument that the phrase "any attachment by a cable television system" in Section 224(a)(4) includes cable modem service is meritless.

Prior to 1996 it was unclear whether Congress intended its definition of "cable system" to apply to Section 224. *Texas Utilities Elec. Co. v. FCC*, 997 F.2d 925, 931-932 (D.C. Cir. 1993). The D.C. Circuit relied on this ambiguity in *Texas Utilities* in affirming the FCC's reading of "cable television system" as referring to a cable company, rather than a set of facilities. *Id.* at 932. Congress eliminated that ambiguity in 1996 by extending the "cable system" definition (47 U.S.C. § 522(7)) to the entire Communications Act. 47 U.S.C. § 153(7). While there is still some awkwardness in the

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Service Electric Cable, Time Warner Cable, and Time Warner Telecom. *Id.* at 6-D-4-6.

Cable companies are also required to report their telecommunications revenues to the FCC on Form 499-A. The FCC publishes a report listing companies that provided interstate telecommunications service, which includes the cable companies identified above and many other cable companies not listed in the NCTA Handbook. *See* Katie Rangos and Jim Lande, *Carrier Locator: Interstate Service Providers* (FCC Common Carrier Bureau, Oct. 2000), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/Locator/locat00.pdf. The FCC uses the data reported on Form 499-A to calculate contributions required of cable companies and other carriers under Title II to the universal service fund and other cost-sharing mechanisms. *See* FCC, *Instructions for Completing the Worksheet for Filing Contributions to Telecommunications Relay Service, Universal Service, Number Administration, and Local Number Portability Support Mechanisms* (2001), *available at* http://www.fcc.gov/Forms/Form499-A/499a.pdf.

statutory language (any attachment *by* a set of facilities rather *for* or *of* a set of facilities), Congress' application of the "cable service" definition to Section 224 in 1996 effectively puts an end to this debate. Congress has said a "cable system" is a set of facilities, and that is the end of the matter. Even if this creates unanticipated consequences (deregulating cable company attachments when cable companies enter the competitive marketplace for Internet access), this is what Congress has said. "If this is not what Congress meant, then Congress has made a mistake and Congress will have to correct it." *Conroy v. Anishoff*, 507 U.S. 511, 528 (1993) (Scalia, J., concurring).

D. Cable Modem Service Is Neither A Cable Service Nor A Telecommunications Service.

1. Cable Service

The Communications Act defines "cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 522(6). Video programming, in turn, is defined as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station," 47 U.S.C. § 522(20), and "other programming service" means "information that a cable operator makes available to all subscribers generally," 47 U.S.C. § 522(14).

The FCC, in fact, already has determined that Internet service is in no way "comparable" to video programming provided by a television broadcast station and thus "falls outside the definition of 'video programming'" under the Communications Act. *In re Internet Ventures, Inc.*, 15 F.C.C.R. 3247, 3254 ¶13 (2000). Nor does Internet service constitute an "other programming service," which is limited

to "information that a cable operator makes available to all subscribers generally." 47. U.S.C. § 522(14). Many of the services provided via the Internet, whether it is the ability to send and receive e-mails, participate in chat rooms, or to create and access a unique home page on a "portal" such as Yahoo!, involve content organized in a format dictated and seen exclusively by that customer. As the Ninth Circuit stated in *AT&T Corp. v. City of Portland*, 216 F.3d 871, 876 (9th Cir. 2000):

> Internet access is not one-way and general, but interactive and individual beyond the 'subscriber interaction' contemplated by the statute. Accessing Web pages, navigating the Web's hypertext links, corresponding via e-mail, and participating in live chat groups involve two-way communications unmatched by the act of electing to receive a one-way transmission of cable or pay-per-view television programming.

216 F.3d at 876. The essence of cable service, therefore, is "one-way transmission of programming to subscribers generally." *Id.* Internet service does not fit this definition.[14]

Furthermore, applying the "carefully tailored scheme of cable television regulation to cable broadband access would lead to absurd results, inconsistent with the statutory structure." *AT&T Corp. v. City of Portland*, 216 F.3d at 877. The court summarized this as follows:

> [C]able operators * * * may be required by the franchising authority to set aside cable channels for public, educational or governmental use, see 47 U.S.C. § 531, must designate some of their channels for commercial use by persons unaffiliated with the

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[14] The FCC acknowledged in its *amicus* brief in the *City of Portland* case that "[s]trong arguments have been advanced in support of the argument that Internet access via cable is *not* a cable service." Br. at 20.

> operator, see 47 U.S.C. § 532, and must carry the signals of local commercial and non-commercial educational television stations, see 47 U.S.C. §§ 534 & 535. We cannot rationally apply these cable television regulations to a non-broadcast interactive medium such as the Internet.

Id.

The Ninth Circuit's analysis in *City of Portland* is consistent with the Eleventh Circuit's reasoning below in so far as both courts rejected the argument that Congress intended to include Internet service in the statutory definition of "cable service." The only difference in the definition of "cable service" between the 1978 Act and the 1996 Act is the inclusion of the words "or use" in § 522(6)(B) ("subscriber interaction, if any, which is required for the selection *or use* of such video programming or other programming service"). The single sentence of legislative history which attempts to explain this addition states that the inclusion of "or use" was meant to "reflect [ ] the evolution of video programming toward interactive services." H.R. Rep. No. 104-204 at 97 (1995), *reprinted in* 1996 U.S.C.C.A.N. at 64. The Eleventh Circuit reasoned in the opinion below:

> Although what it means to reflect an evolution of video programming toward interactive service is not exactly clear, it is clear from Congress' lack of discussion of this change that it was minor in both language and intent. If Congress by the addition of these two words meant to expand the scope of the "cable service" definition from its traditional video base to include all interactive services, video and non-video, it would have said so. Without any substantive comment, we will not read this minor change to effectuate a major statutory shift.

Gov't Pet. App. 28a, 208 F.3d at 1276-1277. Surely this is correct. As this Court has said, "Congress * * * does not alter

the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns, Inc.*, 121 S. Ct. 903, 910 (2001).

2. Telecommunications Service.

While cable modem service is clearly not a "cable service," it is also not a "telecommunications service." The Communications Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public regardless of the facilities used." 47 U.S.C. § 153(46). The crux of the argument in favor of classifying cable modem service as a "telecommunications service" is that cable modem service consists of two elements: a "pipeline" and the Internet service transmitted through that pipeline. *AT&T v. City of Portland*, 216 F.3d at 878.[15] This tracks the definition of an "information service," which means "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications* * * *." 47 U.S.C. § 153(20) (emphasis added). The FCC has defined Internet access service as an information service. *In re Federal State Joint Board on Universal Service*, 13 F.C.C.R. 11,501, 11,532-11,533 ¶66 (1998). Because information service is *by definition* provided "via telecommunications" (*e.g.*, through the "pipeline"), the provision of Internet access via cable modem service must either *be* a telecommunications service, the argument goes, or *include* a telecommunications service.

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[15] *Amici* United States Telecom Association, *et al.*, echo the Ninth Circuit's "pipeline" metaphor when they say that "[w]hatever else the cable operator is doing, it is serving as a basic transparent conduit from a user's residence to the ISP point of presence (and the Internet beyond) * * *." Br. at 7-8.

Certainly this argument has appeal, as indeed do the arguments by *amici* United States Telecom Association, *et al.* to the effect that cable modem service should be regulated in the same way as their xDSL service, which the FCC has classified as a telecommunications service. *See In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 F.C.C.R. 385, 388-389 ¶9 (1999); *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 F.C.C.R. 24,011, 24,030 ¶36 (1998); *see also AT&T Corp. v. City of Portland*, 216 F.3d 871, 879 (9th Cir. 2000). The phone companies' xDSL service provides the same high-speed Internet access as cable modem service, the only difference being the service is provided over phone lines rather than a cable network. However appealing, though, the argument ultimately fails, because the FCC has already ruled that the fact Internet service is provided "via telecommunications" (through a "pipeline"), without more, is not enough to transform that service into a "telecommunications service."

The FCC has ruled that "telecommunications services" and "information services," are "mutually exclusive." *In re Federal State Joint Board on Universal Service*, 13 F.C.C.R. 11,501, 11,508 ¶13 (1998). As noted *supra*, the FCC has ruled that Internet service is an "information service," 13 F.C.C.R. at 11,532-11,533 ¶66, but has also held that entities providing information services "are not thereby providing 'telecommunications service.'" 13 F.C.C.R. at 11,516 ¶33, *citing In re Federal State Joint Board on Universal Service*, 12 F.C.C.R. 8780, 9179-80, ¶¶788-89 (1997). The FCC explained that "a single entity can be both a telecommunications provider and an information services provider, but only in connection with its offering of separate services; it cannot gain that dual status merely as a result of its offering of a single service." 13 F.C.C.R. at 11,520 ¶39 n.77. In short, the Commission has concluded, "[a]n offering that constitutes a single service from the end user's standpoint

is not subject to carrier regulation simply by virtue of the fact that it involves telecommunications components." 13 F.C.C.R. at 11,529-11,530 ¶58. These conclusions, of course, are subject to customary deference. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).[16]

To be sure, the FCC has declined to apply this analysis to cable modem service,[17] and has issued a "Notice of Inquiry" to solicit views regarding what regulatory treatment, if any, should be accorded to cable modem service. However, there is no apparent reason the Commission's existing analysis of "hybrid" services should not apply to cable modem service, nor any indication of when, or even if, the FCC intends to rule on the subject. *See In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, FCC No. 00-355, GN Docket No. 00-185 (Sept. 28, 2000).[18]

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[16] The FCC's determination that Internet service is not a telecommunications service is consistent with the definition of "Internet access service" enacted by Congress in 1998 as part of the Child Online Protection Act, Pub. L. No. 105-277 § 1402 (1998), 112 Stat. 2681-736, (codified at 47 U.S.C. § 231). This statute, which is being challenged on First Amendment grounds in this Court in *Ashcroft v. ACLU*, No. 00-1293 (*cert. granted* May 21, 2001), defines Internet access service as a "service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may include access to proprietary content, information, and other services as part of a package of services offered to consumers. *Such term does not include telecommunications services.*" 47 U.S.C. § 231(e)(4) (emphasis added).

[17] "We express no view in this Report on the applicability of this analysis to cable operators providing Internet access service." 13 F.C.C.R. at 11,535 ¶67 n.140.

[18] The FCC's regulations provide that "proceedings commenced issuing a 'Notice of Inquiry' * * * do not result in the adoption of rules, and Notices of Inquiry are not required to be published in the Federal Register." 47 C.F.R. § 1.430 (2000). Thus, the FCC cannot adopt rules governing the classification of cable modem service until the current proceeding is complete and the Commission undertakes a formal notice

Given the fact that five years after the passage of the 1996 Act there still are no visible signs that an FCC ruling on this issue is imminent, this Court should take the responsibility to decide this important question. Given the FCC's track record here, Petitioners' pleas that the issue should be remanded to the FCC have a distinctly hollow ring. The FCC's rulings in the Universal Service Order give the Court all the analytical tools necessary to resolve this issue and put this debate to an end.

E. The Eleventh Circuit's Decision Is Fully Consistent With Congress' Policy Of Promoting Deployment Of High-Speed Services.

Petitioners argue that the decision below is contrary to Congressional policy promoting high-speed Internet access. Even if the Court is compelled to reach beyond the clear language of the statute to address these policy arguments, Petitioners' arguments fail because the court of appeals' decision is fully consistent with Congressional policy.

In 1996, Congress directed the FCC to "encourage the deployment * * * of advanced telecommunications capability to all Americans * * * by * * * regulating methods that remove barriers to infrastructure investment." 47 U.S.C. § 157, statutory note. In addition, in Section 509 of the 1996 Act, Congress stated "[i]t is the policy of the United States * * * to promote the continued development of the Internet and other interactive computer services and other interactive media." 47 U.S.C. § 230(b)(1). According to Petitioners, these two sections stand for the proposition that Congress cannot have intended to "penalize" the cable industry by eliminating rate regulation for attachments used by cable companies for the delivery of high-speed Internet services.

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and comment rulemaking, commenced by publication of a Notice of Proposed Rulemaking in the Federal Register.

Conspicuously absent from Petitioners' recitation of policy is 47 U.S.C. § 230(b)(2), in which Congress further declared: "It is the policy of the United States * * * to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*" 47 U.S.C. § 230(b)(2) (emphasis added). More fundamentally, it is one thing for Congress to declare a national policy to promote the deployment of the Internet; it is quite another for Congress to "pick winners and losers" in the Internet marketplace by bestowing a financial advantage on one group of Internet providers (and not others) through the mechanism of rate regulation. In the 1996 Act, Congress extended pole attachment rate regulation to telecommunications carriers, but *excluded* incumbent local exchange carriers. 47 U.S.C. § 224(a)(5). Incumbent local exchange carriers are the cable industry's largest competitors in the delivery of Internet service.[19] Placing cable Internet service outside of Section 224 means that cable companies and their chief competitors in the Internet business must pay the same unregulated rates for Internet attachments. Surely it is not reasonable to assume that Congress intended *sub silentio* to "subsidize" the

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[19] The FCC recently reported that "[m]ost residential and small business consumers currently receive Internet service from ISP's via traditional 'dial-up-telephone services provided by local exchange carriers (LECs) over copper wire. *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, FCC No. 00-355, GN Docket No. 00-185 (Sept. 28, 2000). In the area of high-speed Internet access, of the 4.3 million broadband lines the FCC recently reported to be connecting homes and small businesses to the Internet, nearly one million are served by asymmetric digital subscriber lines (ADSL) provided by local exchange carriers. FCC, *Federal Communications Commission Releases Data on High-Speed Services for Internet Access* (Oct. 31, 2000), *available at* http:www.fcc.gov/Bureaus/Common_Carrier/ News_ Re-leases/2000/nrcc0054.html. Moreover, the number of customers served by local exchange carriers increased 157% during the first half of 2000, *id.*, a trend which can be expected to continue.

cable industry's provision of high-speed Internet service, while simultaneously excluding this "subsidy" for their principal competitors. That conclusion would be anathema to a "free market . . . *unfettered by Federal or State regulation.*" 47 U.S.C. § 230(b)(2) (emphasis added).

II. SECTION 224 DOES NOT COVER ATTACHMENTS OF WIRELESS TELECOMMUNICATIONS EQUIPMENT.

Petitioners and their supporting *amici* [20] argue that Section 224(a)(4) defines a covered pole attachment as "any attachment . . . by a provider of telecommunications service," that "provider of a telecommunications service" includes wireless carriers, and thus that wireless carriers are entitled to a regulated rate for any type of facility they wish to attach, whether it is "wireless, wireline or some hybrid type of facility." Gov't Br. at 14.

This argument, while appealing, ultimately fails. It fails, in large part, because it focuses woodenly on the word "any" in the phrase "any attachment" and fails to ask the more pertinent question, which is what did Congress mean by an "attachment." Read as a whole, the statute and its legislative history make clear that Congress intended "attachment" to refer to wireline facilities.[21]

It is important to clarify that the question here is *not* whether Section 224 applies to attachments by wireless carriers. It most certainly does, and the utilities have never

[20] The wireless companies and trade associations are participating in this case as *amici curiae*, rather than as petitioners, because they did not participate in the case before the Eleventh Circuit.

[21] Surely *some* form of limiting principle applies to the phrase "any attachment." Congress can hardly have intended Section 224 to mandate access for cable or telecommunications companies to hang anything at all, from advertising banners to clothes lines, on utility poles.

argued to the contrary. The dispute pertains to the *type of facilities* a wireless carrier can attach subject to Section 224 coverage; the question is whether Section 224 extends to wireless *equipment*, not to wireless *carriers*.[22] The utilities argued below, and the court of appeals agreed, that wireless *equipment* is not covered. The utilities have never taken the position that the *wireline* segments of a wireless carrier's network are outside of the statute. Petitioners' argument on this point is a complete red herring. Despite some imprecise language, the court of appeals' opinion is best read to hold that the FCC lacks jurisdiction to regulate attachments of wireless *equipment*, not wireless *carriers*. Thus, to the extent a wireless carrier seeks to attach a wireline facility to a utility pole, whether for "traffic backhaul, redundancy, intermodal operations," or other purposes, Br. of Association for Local Telecommunications Services, *et al.* as *Amici Curiae* (hereinafter, "Wireless *Amici*"), at 14, the wireline attachment is subject to Section 224.[23]

[22] Wireless equipment is vastly different from wireline attachments. Unlike wireline attachments, wireless equipment has no need to be installed through the linear corridors of the poles, ducts, conduits and rights-of-way of a utility's distribution system. A wireless antenna is a discrete single point installation. Physically, wireline and wireless attachments are completely different. Wireless attachments typically include "an antenna or antenna clusters, a communications cabinet at the base of a pole, coaxial cables connecting antennas to the cabinet, concrete pads to support the cabinet, ground wires and trenching, and wires for telephone and electric service." Gov't Pet. App. at 96a, 13 F.C.C.R. at 6799 ¶42.

[23] Certain fixed wireless companies, which operate by placing an antenna on a rooftop and running wires into buildings, have argued before the FCC in a separate proceeding that easements utility companies have to run their wires inside buildings are "rights-of-way" within the meaning of Section 224 and thus that fixed wireless carriers are entitled to access these in-building pathways for their own wires to connect to their customers. *See, e.g., In re Promotion of Competitive Networks in Local Telecommunications Markets*, 15 F.C.C.R. 22,983 (2000). *See also,*

When the original pole attachment legislation was being considered in the mid-1970's, both the Administration and Congress were concerned about delegating jurisdiction over electric companies to the FCC. Thomas J. Hauser, head of the White House Office of Telecommunications Policy, expressed this concern in 1976 in written comments to the Chairman of the House subcommittee considering the legislation. The number one item on Mr. Hauser's list of concerns about the proposed legislation was "the efficacy and propriety of delegating jurisdiction over electric companies and other noncommunications utilities to the Commission." H.R. Rep. No 94-1630, at 33-34 (Add. B at 60a). The following year, the new acting head of that office expressed similar concerns: "We do not believe the FCC should be delegated general jurisdiction over the facilities of electric companies and other noncommunications utilities." H.R. Rep. No. 95-721, pt. 2, at 12 (1977) (Add. C at 85a). On the floor of the Senate, the legislation's sponsor, Senator Ernest Hollings, echoed this concern when he introduced the Senate version of the legislation. 123 Cong. Rec. 14,974 (May 17, 1977) ("* * * we should examine the appropriateness of dele-gating to the FCC jurisdiction over nontelephone company practices not heretofore within the ambit of that agency's authority").

Congress responded to these concerns by making a very narrow grant of additional jurisdiction to the FCC, which is

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Comments of Winstar Communications, Inc., WT Docket No. 99-217 (filed Aug. 27, 1999); *Comments of Teligent, Inc.*, WT Docket No. 99-217 (filed Aug. 27, 1999). The wireless companies have also argued that a license a utility company may have to place an antenna on a rooftop is also a "right-of-way" thus permitting the wireless company to piggy-back its own antennas on this site under Section 224. The utility companies' position is that neither its in-building easements nor its rooftop licenses are "rights-of-way," and thus fixed wireless companies do not have mandatory access to these in-building pathways and rooftop sites under Section 224.

explained in considerable detail in the Senate Report which accompanied the legislation. S. Rep. No. 95-580, *reprinted in* 1978 U.S.C.C.A.N. 109 (Add. A at 1a). The Report explains that the FCC's new jurisdiction will apply only in the "communications space" on a pole, which is the space used for the attachment of wire communications:

> Federal involvement in pole attachments matters will occur only where space on a utility pole has been designated and is actually being used for communications services *by wire or cable*. Thus . . . if provision has been made for attachment of *wire communications* a communications nexus is established sufficient to justify, in a jurisdictional sense, the intervention of the Commission.
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> * * * *
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> This expansion of FCC regulatory authority is strictly circumscribed and extends only so far as is necessary to permit the Commission to involve itself in arrangements affecting the provision of utility pole communications space to CATV systems.

S. Rep. No. 95-580, at 15, *reprinted in* 1978 U.S.C.C.A.N at 123 (Add. A at 9a).

Congress implemented these jurisdictional limitations in three specific places in the statute. First, it defined a "utility" subject to the statute as "a person . . . who owns or controls poles, ducts, conduits or rights of way used, in whole or in part, *for wire communications*." 47 U.S.C. § 224(a)(1) (emphasis added). Second, it defined the "usable space" on a pole as the "the space above the minimum grade level which can be used for the attachment *of wires, cables, and associated equipment*." 47 U.S.C. § 224(d)(2) (emphasis added). Third, it established standards for the Commission's exercise of its authority to set rates for attachments by a

CATV system. 47 U.S.C. § 224(d)(1). The concept of "usable space" was built into this standard.[24]

An earlier version of the pole attachment legislation expressly called for regulation for "any attachment for wire communication" rather than the eventual "any attachment by a cable television system." H.R. Rep. No. 94-1630, at 2 (1976) (Add. B at 29a). This language was changed at the behest of the FCC, which wrote to Congress explaining that:

> under the proposed bill, the Commission might be involved in assuring just and reasonable rates for the use of poles by not only cable television system operators but also by many other users of wire communications. We understand that, in addition to cable systems, a large number of other entities utilize space on utility poles. These include public safety uses such as police, fire and traffic signaling, in addition to use by communications common carriers such as Western Union * * * It seems certain that the scope of a regulatory program designed to insure just and reasonable rates for the leasing of pole space by all these entities would be much larger than that necessary to insure just rates for cable systems. We would recommend therefore that if the legislative intent of this bill is merely to remedy pole attachment problems which are of importance to the cable industry, then its application should be so limited, preferably by inserting the term "cable television system" as defined by 47 C.F.R. § 76.5(a) in lieu of "wire communications."

[24] Section 224(d) provided: "For purposes of subsection (b) of this section, a rate is just and reasonable if assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total *usable space*, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit or right-of-way." 47 U.S.C. § 224(d) (emphasis added).

H.R. Rep. No. 94-1630, at 30-31 (Add. B at 53a-54a). It was thus clear that the original statute was intended to cover wireline attachments. Cable companies attach wireline facilities to utility poles.

The only pertinent change Congress made in 1996 was to add "telecommunications carriers" to Section 224. Congress did not change the statute's jurisdictional restriction to utilities which own or control poles "used, in whole or in part, for *wire communications*." 47 U.S.C. § 224(a)(1). Congress also did not change the definition of "usable space," which continues to mean "the space above the minimum grade level which can be used for the attachment of *wires, cables, and associated equipment*." 47 U.S.C. § 224(d)(2). More importantly, Congress incorporated the term "usable space" into the new formula established in Section 224(e) for attachments by "telecommunications carriers." 47 U.S.C. §§ 224(d) (2), (3). Wireless carriers are "telecommunications carriers;" if their attachments are covered at all, they must be covered under the 224(e) formula. But this formula is defined in terms of *wires, cables and associated equipment*. To read Section 224(e) as covering wireless equipment would read the Section 224(d)(2) definition of "usable space" out of the statute.[25] The language Congress used in Section 224(d)(2) and Section 224(e) could hardly be more plain. Telecommunications carriers, including wireless carriers, are entitled to a regulated rate for attachments of *wires, cables and associated equipment*. Wireless facilities are not covered.

This conclusion is buttressed in a number of significant ways. First, as the court of appeals noted, there is not a single

[25] Even the notion of the "space above the minimum grade" contained in the Section 224(d)(2)'s definition of usable space has no meaning in the case of wireless facilities, which typically include cables running down from the antenna or antenna cluster to a communications cabinet at the base of the pole, which itself sits on a concrete pad and is connected to a power source through ground wires buried in trenches.

mention of wireless telecommunications in Section 703 of the 1996 Act, which amended Section 224, or in its legislative history. Congress did, however, deal extensively with the siting of wireless equipment in the very next section of the 1996 Act, Section 704. Pub. L. No. 104-104, Title VII, at § 704(d), 110 Stat. 152 (codified at 47 U.S.C § 332) (Add. E at 93a-95a).[26] The siting of wireless equipment was a highly controversial subject in 1996, with the interests of wireless carriers clashing with the interests of local communities concerned about the placement, height, appearance, and potential negative health effects of wireless facilities.[27] In Section 704(a), which is entitled "National Wireless Telecommunications Siting Policy," Congress sought to reconcile these competing interests by guaranteeing that local authorities would retain ultimate control over decisions regarding the siting of wireless facilities while at the same time placing restrictions on their ability to deny applications for wireless siting authority.[28] Congress stated that nothing in the Act could "limit or affect the authority of the state or local government or instrumentality thereof over decisions

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[26] As the court of appeals noted, the wireless siting section of the Telecommunications Act of 1996 follows the pole attachment section; as codified, however, the two sections do not follow one another.

[27] For a comprehensive discussion of the many issues involved in wireless siting, *see* Kevin M. O'Neill, *Wireless Facilities Are A Towering Problem: How Can Local Zoning Boards Make The Call Without Violating Section 704 of the Telecommunications Act of 1996?*, 40 Wm. & Mary L. Rev. 975 (1999).

[28] Congressman Bliley, who chaired the House Commerce Committee that oversaw the passage of the Act, stated "nothing is in this Bill that prevents a locality . . . from determining where a cellular pole should be located . . . we do not allow a community to say that we are not going to have any cellular pole in our locality. That is wrong, nor are we going to say that they can delay these people forever. *But the location will be determined by the local governing body.*" 141 Cong. Rec. H8274 (Daily ed. Aug. 2, 1995) (Statement of Rep. Bliley) (emphasis added).

regarding the placement, construction, and modification of personal wireless service facilities." Telecommunications Act of 1996, Pub. L. No. 104-104, § 704 (codified at 47 U.S.C. § 332(c)(7)(A)(Supp. II 1996)) (Add. E at 93a).

Section 704(a) represents a careful balancing of the preservation of local zoning authority over the placement of wireless facilities and the federal interest in promoting the development of wireless services. Congress used Section 704 to impose several specific restrictions on local zoning boards considering applications for wireless facility placement. These include the requirement that the local zoning authorities (1) not discriminate among providers of functionally equivalent services, § 332(c)(7)(B)(i)(I); (2) not adopt rules that would have the effect of an outright prohibition on the provision of personal wireless services, § 332(c)(7)(B)(i)(II); (3) act on siting requests "within a reasonable amount of time;" and (4) issue decisions in writing supported by "substantial evidence contained in a written record," §§ 332(c)(7)(B)(ii) and (iii). Facility siting decisions can not be based on health and safety concerns so long as the wireless antennas otherwise meet the FCC's requirements in this area. § 332(c)(7)(B)(4). If a locality's actions violate Section 704, the legislation provides for accelerated judicial review within 30 days of the adverse action. § 332(c)(7)(B)(v).[29]

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[29] Congress dealt still further with wireless siting in Section 704(c), establishing a national policy of making Federal government property available for the placement of wireless telecommunications equipment. 47 U.S.C. § 332, statutory note. This subsection does not impose regulated rates for placement of wireless equipment on federal property; to the contrary, wireless sites are leased from the federal government at market rates. *See Facilitating Access to Federal Property for the Siting of Mobile Services, President's Memorandum on Mobile Service Antennas*, 31 Weekly Comp. Pres. Doc. 1424; 60 Fed. Reg. 42,023 (Aug. 10, 1995) (Presidential directive to make federal buildings available for siting wireless equipment); *see also, Placement of Commercial Antennas on*

As the court of appeals properly noted, Congress dealt comprehensively with the controversial issue of wireless siting in the "National Wireless Telecommunications Siting Policy" established in 47 U.S.C. § 332. The specificity with which Congress addressed wireless siting in Section 332 surely indicates it did not intend that Section 224 provide the FCC authority to regulate the siting of wireless equipment.

Even more fundamentally, the Pole Attachments Act is designed to deal with the potential exercise of monopoly power over bottleneck facilities. Utility poles are not, even potentially, bottleneck facilities for wireless equipment. Wireless equipment can be sited on virtually any tall building or structure, such as rooftops, communications towers, water towers, monopoles, billboards, highway light structures, church steeples, etc. Indeed, an entire commercial industry has emerged which is dedicated to siting wireless equipment. As the court of appeals stated, it is "beyond question * * * that utility poles are not bottleneck facilities for wireless systems." Gov't Pet. App. at 25a; 208 F.3d at 1275. Because they are not, the court of appeals properly held Section 224 does not cover wireless attachments.[30]

Federal Property, 61 Fed. Reg. 14,100 (Mar. 29, 1996) (General Services Administration guidelines), 64 Fed. Reg. 30,523 (May 28, 1999) (extending guidelines indefinitely); *Placement of Commercial Antennas on Federal Property*, 62 Fed. Reg. 32,611, 32,613 (June 6, 1997) (same) 64 Fed. Reg. 30,523 (May 28, 1999) (extending guidelines indefinitely); *Public Buildings and Space*, 63 Fed. Reg. 10,631 (Mar. 4, 1998) (same); *Pricing Policy for Occupancy of GSA Space*, 66 Fed. Reg. 23,169 (May 8, 2001) (interim rule).

[30] The claim of the Wireless *Amici* that there is no support in the record for the court's factual finding is untrue. On September 15, 1998, UTC, a trade association representing the telecommunications interests of utility companies, submitted comments in the FCC docket in the rulemaking below detailing at length the robust competitive market that exists for siting wireless equipment. United Telecom Council, Ex Parte Notice, CS Docket No. 97-151 (filed Sept. 15, 1998).

The Wireless *Amici* make three arguments against the factual conclusion that utility poles are not bottlenecks for wireless equipment. First, they argue that utility poles are bottleneck facilities because they are bottlenecks for the *wireline* segments of a wireless carrier's network. As discussed *supra*, this is a straw man argument, since utilities have always acknowledged that wireline facilities of a wireless carrier are covered by Section 224.[31] Second, the Wireless *Amici* argue that utility facilities are bottlenecks because fixed wireless carriers must place their antennas on the rooftops of buildings they service and run their wires through in-building pathways. Again, to the extent wireline facilities are involved, the utilities agree that Section 224 is theoretically applicable, although the utilities do not believe in-building pathways are covered by the Act. As to rooftops, control of antenna sites rests with the building owner, not the utility company; utilities can hardly be bottlenecks. Finally, the Wireless *Amici* spend several pages cataloging the fact that electric utility companies are in the business of providing wireless antenna sites on utility facilities. Br. at 16-17. Although the point the Wireless *Amici* purport to be making by this is obscure, the fact of the matter is that some (but by no means all) [32] electric utility companies are enthusiastically involved in the robust free market for wireless sites through the use of free-standing communications towers and transmission towers in their system.[33] Utility companies

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[31] This straw man argument is the *only* argument the Government makes as to why utility poles are allegedly not bottleneck facilities. Gov't Br. at 34-5.

[32] The Southern Companies do not currently market their transmission towers for any type of pole attachment.

[33] As the brief of *amici* Site Owners and Managers Alliance demonstrates, there is a vibrant free market for wireless sites. Indeed, even wireless carriers themselves have gone into the tower business. Sprint Communications has established a subsidiary specifically to exploit the free market for wireless sites. Sprint Sites USA, *About Us*, *at*

charge a market rate for these antenna sites, as do their competitors—tower companies, building owners, billboard owners, municipalities, etc. But the fact that wireless carriers *do* site antennas on utility facilities certainly does not make utility facilities bottlenecks.

Even if utility poles are not bottleneck facilities for wireless equipment, the Government argues that Section 224 does not use the term "bottleneck facility" or any cognate term, Gov't Br. at 34, and thus the statute applies by its terms to wireless equipment regardless of whether utility poles are bottlenecks for the attachment. The Government support this argument by citing to *Brogan v. United States*, 522 U.S. 398, 403 (1998) for the proposition that "it is not, and cannot be, [judicial] practice to restrict the unqualified language of the statute to the particular evil that Congress was trying to remedy." This argument is meritless, since the text of Section 224(d)(2) makes it clear that the statute *by its terms* applies to wires, cables and associated equipment. Moreover, even the most ardent textualist may wonder about the wisdom of interpreting a statute in a way that makes its central purpose—to address the potential exercise of monopoly power over bottleneck facilities—irrelevant. In any event, the issue is academic, since the statute is clear if one takes the trouble to read all of its terms. As on the cable Internet question, the Government and the Wireless *Amici* wish to

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http://www.sprintsites.com/about.html (last visited May 10, 2001) ("Sprint Sites USA was created to manage and operate Sprint's portfolio of more than 4,600 towers for the wireless communications industry."). Similarly, 360° Communications Company, which provides wireless voice and data services to 2.6 million customers, has leased its antenna sites to Omnipoint Communications, the second-largest publicly traded PCS company in the U.S. *360° Communications Signs Tower Collocation Agreement with Omnipoint Communications, available at* http//www.prnewswire.com/gh/cnoc/comp/ 111849.html (April 29, 1998). (360° Communications merged with Alltel Corp. in July 1998, *see* Alltel Corp., SEC Form 10-K 405 at 2 (filed Mar. 1, 2001)).

latch on to certain bits of the statute that support their position and to ignore the rest. From time immemorial, this has not been a permissible way to read a statute.

A vibrant free market exists for wireless sites, on towers, on monopoles, on rooftops, on billboards, on church steeples. The market rate for leasing wireless sites varies widely, but typically is $1,500 to $2,000 per month. A regulated pole attachment rate is about $6 per *year*. Congress ought not to be presumed to have taking the dramatic step of regulating the wireless siting market—or more precisely, a tiny segment of the wireless siting market—in Section 224 without saying a word, particularly given its comprehensive treatment of this highly controversial subject elsewhere in the 1996 Act. Section 224 does not reflect the kind of "textual commitment of authority" to the FCC to regulate wireless siting which this Court has held to be a necessary predicate to the exercise of agency power. *See Whitman v. American Trucking Ass'n, Inc.*, 121 S. Ct. 903, 910 (2001) ("Congress * * * does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions"); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion"); *MCI Telecomm. Corp. v. American Tel. & Tel. Co.* 512 U.S. 218, 231 (1994)("it is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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June 5, 2001

ADDENDA

ADDENDUM A

SENATE REPORT NO. 95-580

[page 1]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 1547) to amend the Communications Act of 1934, as amended, with respect to penalties and forfeitures, and to authorize the Federal Communications Commission to regulate pole attachments, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

SUMMARY AND PURPOSE

The bill (S. 1547) serves two purposes:

(1) To unify, simplify, and enlarge the scope of the forfeiture provisions of the Communications Act of 1934; and

(2) To establish jurisdiction within the Federal Communications Commission (FCC) to regulate the provision by utilities to cable television systems of space on utility poles, ducts, conduits, or other rights-of-way owned or controlled by those utilities.

PENALTIES AND FORFEITURES

S. 1547, as reported, would unify and simplify the forfeiture provisions in the Communications Act of 1934, enlarge their scope to cover all persons subject to the act, provide more practical limitations periods and more effective deterrent levels of forfeiture authority, and would generally afford the Federal Communications Commission greater flexibility in the enforcement of the Communications Act and rules and regulations promulgated thereunder.

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The Communications Act of 19334 now imposes monetary civil penalties on certain individuals who fail to comply with the Communications Act, FCC regulations, or related matters. These civil liabilities include the forfeiture provisions in section 503 (b) (relating to the broadcast services) and section 510 (applicable to nonbroadcast radio stations). S. 1547 would enlarge the scope of forfeiture liability under these sections to cover other persons subject to the Communications Act—such as cable television systems, users of experimental or medical equipment emitting electromagnetic radiation, persons operating without a valid radio station or operator's license, and some communications equipment manufacturers.

S. 1547, as reported, would make three alterations in the existing forfeiture provisions. First, it would extend the limitations period within which notices of liability must be issued: for persons not previously subject to forfeiture liability, 1 year; for nonbroadcast licensees, from the present 90 days to 1 year; and for broadcast licensees, from the present 1 year to 1 year or the current license term, whichever is longer, not to exceed 3 years. Second, the maximum forfeiture that could be imposed for a single violation would be raised to $2,000; for multiple violations, within any single notice of liability, $20,000 for a common carrier, broadcast licensee, or cable system operator, and $5,000 in the case of all other persons. Third, the bill would authorize the Commission to mitigate or remit common carrier forfeitures in the same way as it now may with respect to all other forfeitures. Furthermore, the Commission would be given its choice of using the traditional "show cause" procedure for imposing a forfeiture or alternatively holding an adjudicatory hearing under section 554 of the Administrative Procedure Act.

POLE ATTACHMENT REGULATION

S. 1547, as reported, would empower the Commission to hear and resolve complaints regarding the arrangements between cable television systems and the owners or controllers of utility poles. A pole attachment, for purposes of this bill, is the occupation of space on a utility pole by the distribution facilities of a cable television system—coaxial cable and associated equipment—under contractual arrangements whereby a CATV system rents available space for an annual or other periodic fee from the owner or controller of the pole—usually a telephone or electric power company. The Commission would prescribe regulations to provide that the rates, terms, and conditions for pole attachments are just and reasonable. For a period of 5 years after enactment of this act, the Commission would employ a specified rate-setting formula in determining whether a particular pole attachment rate is just and reasonable. The formula describes a range between marginal and a proportionate share of fully allocated costs within which pole rates are to fall.

Any State which chooses to regulate pole attachments may do so at any time, and will preempt the Commission's involvement in pole attachment arrangements in that State simply by notifying the FCC that it regulates the rates, terms, and conditions for such attachments. S. 1547 in no way limits or restricts the powers of the several States to regulate pole attachments.

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The jurisdictional restrictions of section 2(b) of the act (47 U.S.C. 152(b)) are modified to permit the FCC to regulate practices of intrastate communications common carriers as they relate to pole attachments. Utilities owned by the several States or their political subdivisions, and utilities owned by the Federal Government, are exempt from FCC, pole attachment regulation. In like manner, the provisions of S. 1547 do not apply to any cooperative electric or telephone utility, or any railroad.

BACKGROUND AND NEED

S. 1547 was introduced by Senator Hollings on May 17, 1977. The committee held hearings on the bill on June 23 and 24, 1977. Additional written submissions were received from interested parties, who expressed their views on the bill in its form as introduced, on a study of pole attachment problems of the Commission's Office of Plans and Policy, and on alternative pole attachment legislation suggested by the FCC's Common Carrier Bureau. That portion of S. 1547 relating to forfeiture authority is identical to S. 2343, which the Senate passed in June 1976 during the 94th Congress.

* * *

POLE ATTACHMENT REGULATION

It is the general practice of the cable television (CATV) industry in the construction and maintenance of a cable system to lease space on existing utility poles for the attachment of cable distribution facilities (coaxial cable and associated equipment). These leasing agreements typically involve the rental of a portion of the communications space on a pole for an annual or other periodic fee as well as reimbursement to the utility for all costs associated with preparing the pole for the CATV attachment. The FCC estimates that there are currently over 7,800 CATV pole attachment agreements in effect. Approximately 95 percent of all CATV cables are strung above ground on utility poles, the remainder being placed under-ground in ducts, conduits, or trenches. These poles, ducts, and conduits are usually owned by telephone and electric power utility companies, which often have entered into joint use or joint ownership agreements for the use of each other's poles. It is estimated that approximately 70 percent of all utility poles owned by either telephone or electric utilities are actually jointly used. These joint utility agreements commonly reserve a portion of each

pole for the use of communications services (telephone, telegraph, CATV, traffic signaling, municipal fire and police alarm systems, et cetera). This communications pole space is usually under the control of the telephone company.

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Owing to a variety of factors, including environmental or zoning restrictions and the costs of erecting separate CATV poles or entrenching CATV cables underground, there is often no practical alternative to a CATV system operator except to utilize available space on existing poles. The number of poles owned or controlled by cable companies is insignificant, estimated to be less than 10,000, as compared to the over 10 million utility-owned or controlled poles to which CATV lines are attached.

Sharing arrangements minimize unnecessary and costly duplication of plant for all pole users, utilities as well as cable companies. Nevertheless, pole attachment agreements between utilities which own and maintain pole lines, and cable television systems which lease available space have generated considerable debate. Conflict arises, understandably, from efforts by each type of firm to minimize its share of the total fixed costs of jointly used facilities. Of the more than 10 million poles on which cable operators lease space, fewer than half are controlled by telephone companies, while 53 percent are controlled by power utilities, public and private. Most CATV systems lease space from more than one utility. An estimated 72 percent of all cable systems lease pole space from Bell Telephone operating companies, approximately 65 percent have agreements with investor-owned power companies, an additional 21 percent lease space from independent telephone companies, while 10 percent attach to poles owned by REA cooperatives and 14 percent acquire space from utilities owned by municipalities.

Due to the local monpoly in ownership or control of poles to which cable system operators, out of necessity or business

convenience, must attach their distribution facilities, it is contended that the utilities enjoy a superior bargaining position over CATV systems in negotiating the rates, terms and conditions for pole attachments. It has been alleged by representatives of the cable television industry that some utilities have abused their superior bargaining position by demanding exorbitant rental fees and other unfair terms in return for the right to lease pole space. Cable operators, it is claimed, are compelled to concede to these demands under duress. The Commission's Office of Plans and Policy, in a staff report released in August 1977, concluded that, "[a]lthough the reasonableness of current pole attachment rates remains open to question, public utilities by virtue of their size and exclusive control over access to pole lines, are unquestionably in a position to extract monopoly rents from cable TV systems in the form of unreasonably high pole attachment rates" (page 34).

The committee received testimony that the introduction of broadband cable services may pose a competitive threat to telephone companies, and that the pole attachment practices of telephone companies could, if unchecked, present realistic dangers of competitive restraint in the future. The Commission has investigated the competitive inter-relationships of telephone and cable companies in various proceedings and contexts, and has taken action to curtail potential anticompetitive practices in several instances. (See for example, *Common Carrier Tariffs for CATV Systems, 4* FCC 2d 257 (1966); *General Telephone Co. of California,* 13 FCC 2d 448, *af d.* 413 F. 2d 390 D.C. Cir. *cert. denied,* 396 U.S. 888 (1969). *See also, General Telephone Co. of the Southwest* v. *United States, 449* F. 2d 846, 857 (5th cir. 1971).)

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The pole attachment policies and practices of utilities owning or controlling poles are generally unregulated at the present time. Currently only one State—Connecticut—

actually regulates pole attachment arrangements, while in another eight States, regulatory authority apparently exists but has *not* been exercised—California, Hawaii, Nevada, Alaska, Rhode Island, Vermont, New Jersey, and New York. According to a recent survey conducted by the Commission's Cable Television Bureau, entitled "Cable Television Pole Attachment—State Law and Court Cases," very few States have specific statutory provisions governing attachments to utility poles. Only 15 States, including the District of Columbia, appear to have enacted statutory authority which may be of sufficient breadth to permit regulation by an appropriate State body.

JURISDICTIONAL BASIS FOR FCC REGULATION

Moreover, the Federal Communications Commission has recently decided that it has no jurisdiction under the Communications Act of 1934, as amended, to regulate pole attachment and conduit rental arrangements between CATV systems and nontelephone or telephone utilities. *(California Water and Telephone Co., et al,* 40 R.R. 2d 419 (1977).) This decision was the result of over 10 years of proceedings in which the Commission examined the extent and nature of its jurisdiction over CATV pole attachments. The Commission's decision noted that, while the Communications Act conferred upon it expansive powers to regulate all forms of electrical communication, whether by telephone, telegraph, cable or radio, CATV pole attachment arrangements do not constitute "communication by wire or radio," and are thus beyond the scope of FCC authority. The Commission reasoned:

> The fact that cable operators have found in-place facilities convenient or even necessary for their businesses is not sufficient basis for finding that the leasing of those facilities is wire or radio communications. If such were the case, we might be called upon to regulate access and charges for use of public and private roads and right of ways essential for the laying of wire, or even access and rents for antenna sites.

In addition the Commission concluded that there was no reason to separate resolution of the purely legal question of jurisdiction on the basis of whether the party owning or controlling the pole was a telephone or nontelephone company.

The committee believes that S. 1547, as reported, will resolve this jurisdictional impasse, by creating within the FCC an administrative forum for the resolution of CATV pole attachments disputes and by prompting the several States, should they wish to involve themselves in these matters, to develop their own plans free of Federal prescriptions.

The committee believes that Federal involvement in pole attachment arrangements should, serve two specific, interrelated purposes: To establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public.

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The basic design of S. 1547, as reported, is to empower the Federal Communications Commission to exercise regulatory oversight over the arrangements between utilities and CATV systems in any case where the parties themselves are unable to reach a mutually satisfactory arrangement and where a State or more local regulatory forum is unavailable for resolution of disputes between these parties. S. 1547, as reported, accomplishes this design in the most direct and least intrusive manner. Federal involvement in pole attachments matters will occur only where space on a utility pole has been designated and is actually being used for communications services by wire or cable. Thus, regardless of whether the owner or controller of the pole is an entity engaging in the provision of communications service by wire, if provision has

been made for attachment of wire communications a communications nexus is established sufficient to justify, in a jurisdictional sense, the intervention of the Commission. The underlying concept of S. 1547, as reported, is to assure that the communications space on utility poles, created as a result of private agreement between nontelephone companies and telephone companies, or between nontelephone companies and cable television companies, be made available, at just and reasonable rates, and under just and reasonable terms and conditions, to CATV systems.

S. 1547, as reported, stops short of declaring the provision of pole space to CATV "wire or radio communications" per se, or that poles constitute "instrumentalities, facilities. apparatus," *et cetera* incidental to wire communications (as used in section 3(a) of the Communications Act, 47 U.S.C. 153 (a)). However, S. 1547, as reported, does expand the Commission's authority over entities not otherwise subject to FCC jurisdiction (such as electric power companies) and over practices of communications common carriers not otherwise subject to FCC regulation (principally the intrastate practices of interstate or intrastate telephone companies). This expansion of FCC regulatory authority is strictly circumscribed and extends only so far as is necessary to permit the Commission to involve itself in arrangements affecting the provision of utility pole communications space to CATV systems. Even in this instance S. 1547, as reported, does not contemplate a continuing direct involvement by the Commission in all CATV pole attachment arrangements. FCC regulation will occur only when a utility or CATV system invokes the powers conferred by S. 1547, as reported, to hear and resolve complaints relating to the rates, terms, and conditions of pole attachments. The Commission is not empowered to prescribe rates, terms, and conditions for CATV pole attachments generally. It may, however, issue guidelines to be used in determining whether the rates, terms, and conditions for

CATV pole attachments are just and reasonable in any particular case.

Moreover, the Commission's jurisdictional reach extends only to those entities which participate in the provision of communications space on utility poles. Thus, an electric power company which owns or controls a utility pole would be subject to FCC jurisdiction only if two preconditions are met: (1) the power company shares its pole with a telephone company, or other communications entity; and (2) a cable television system shares the communications space on the pole with the telephone utility or other communications entity, or occupies the communications space alone. An electric power company owning or

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controlling a pole on which no communications space has been designated would not be subject to FCC jurisdiction. S. 1547, as reported, does not vest within a CATV system operator a right to access to a utility pole, nor does the bill, as reported, require a power company to dedicate a portion of its pole plant to communications use.

It has been made clear in testimony by CATV industry representatives to this committee that access to utility poles does not in itself constitute a problem, among other reasons because CATV offers an income-producing use of an otherwise unproductive and often surplus portion of plant. CATV industry representatives estimate that about 15 percent of all utility poles owned or controlled by electric power companies are not occupied by telephone companies as well, and that CATV systems are already attached to a high percentage of these power poles in communities served by cable television.

While S. 1547, as reported, does not legislate a guarantee of access by CATV systems to utility poles, the committee recognizes that it is conceivable that a nontelephone utility

which currently provides CATV pole attachment space might discontinue such provision simply in order to avoid FCC regulation. The committee believes that under S. 1547, as reported, the Commission could determine that such conduct would constitute an unjust or unreasonable practice and take appropriate action upon a finding that CATV pole attachment rights were discontinued solely to avoid jurisdiction.

Furthermore, S. 1547, as reported, would not require the Commission, as it stated in its *California Water and Telephone Co.*, decision, noted above, "to regulate access and charges for use of public and private roads and right-of-ways essential for the laying of wire, or even access and rents for antenna sites." The communications space must already have been established, meaning that FCC jurisdiction arises only where a pole, duct, conduit, or right-of-way has already been devoted to communications use, and the communications space must already be occupied by a cable television system. Hence any problems pertaining to restrictive easements of utility poles and wires over private property, exercise of rights of eminent domain, assignability of easements or other acquisitions of right-of-way are beyond the scope of FCC CATV pole attachment jurisdiction. Any acquisition of any right-of-way needed by a cable company is the direct responsibility of that company, in accordance with local laws. S. 1547, as reported, is not intended to disturb such matters in any way.

STATE OR LOCAL CATV POLE ATTACHMENT REGULATION

S. 1547, as reported, permits any State which regulates the rates, terms, and conditions for CATV pole attachments to preempt the Federal Communications Commission's regulation of pole attachments in that State. The committee considers the matter of CATV pole attachments to be essentially local in nature, and that the various State and local regulatory bodies which regulate other practices of telephone and electric utilities are better equipped to regulate CATV

pole attachments. Regulation should be vested with those persons or agencies most familiar with the local environment within which utilities and cable television systems operate. It is only because such State

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or local regulation currently does not widely exist that Federal supplemental regulation is justified.

However, the framework for such State and local regulation is already in place. CATV systems and electric power and telephone utilities are subject, in varying degrees, to local or State regulation in numerous ways. State and local public service commissions and other agencies already possess a wealth of experience in regulating intrastate power and telephone companies. CATV systems are granted franchise permits from the officials in the communities in which they operate. Several States have cable television commissions which perform regulatory functions in addition to those performed by the community franchising authorities.

Nevertheless, in the absence of regulation by these State and local authorities of CATV pole attachments, the Federal Communications Commission should fill the regulatory vacuum to assure that rates, terms, and conditions otherwise free of governmental scrutiny are assessed on a just and reasonable basis. The committee looks to a replacement of interim FCC jurisdiction by the States and localities concerned with the orderly growth of cable television. Since this is a relatively novel issue in many States, there will be a time before many assert CATV pole attachment jurisdiction. Most States will require special legislation in order to empower their utility commissions with the requisite authority. Some States may wish to conduct studies of local needs prior to considering legislative action. There is, too, the possibility that some States may not choose to regulate in this area.

S. 1547, as reported, establishes a simple notification process whereby a State may recapture CATV pole attachment jurisdiction by certifying to the Commission that it regulates the rates, terms, and conditions for CATV pole attachments. The bill as reported makes clear that the Commission shall be foreclosed from regulation with respect to pole attachments in any State which has so certified to the Commission. Receipt of such a certification from the State shall be conclusive upon the Commission. The FCC shall defer to any State regulatory program operating under color of State law, even if debate or litigation at the State level is in progress as to the authority of the State or local body to carry out a CATV pole attachment regulatory program. However, since the purpose of the bill as reported is to create a forum that is, in fact, available to adjudicate pole attachment disputes, State preemption of FCC jurisdiction would not occur if a State only had authority to regulate in this area but was not actually implementing that authority. Thus, if a State is regulating, or is prepared to regulate upon a proper request, the FCC is preempted. Litigation challenging the State's authority would not affect that preemption unless the reviewing court or other authority had imposed a stay of State regulation pending outcome of the litigation.

S. 1547, as reported, unlike the bill as introduced, imposes no rate-setting formula upon the States. The committee believes that the States should have maximum flexibility to develop a regulatory response to pole attachment problems in accordance with perceived State or local needs and priorities. The committee is of the opinion that no Federal formula could accommodate all the various local needs and priorities

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in an entirely satisfactory manner. As noted above, the committee believes that familiarity with the specific operating environment of the utilities and cable television systems within a State, as well as the needs and interests of State or

local constituents, is indispensable to efficient and equitable regulation.

Furthermore, imposition of a Federal ratesetting formula on the States would discourage State regulation by leaving only ministerial functions to the State public utility commissions or other regulatory agencies of the States or localities. The committee wishes to facilitate the replacement of FCC regulation in this area, not to vest within the Commission permanent nationwide pole attachment duties.

Ultimately, CATY pole attachment ratesetting involves equity considerations. Decisions regarding the allocation of pole costs among users should reflect in some rough sense the ability of cable subscribers and the utilities' customers to pay for costs which are passed along to them. Another significant equity consideration is the relative importance of each of the respective services to the communities served. Considerations of equity should turn on the needs and interests of local constituents. Given the fact that State public service commissions or local regulatory bodies are better attuned to these needs and interests than a Federal agency, jurisdiction over CATV pole attachments should rest with non-Federal officials.

Because the pole rates charged by municipally owned and cooperative utilities are already subject to a decisionmaking process based upon constituent needs and interests, S. 1547, as reported, exempts these utilities from FCC regulation. Presently cooperative utilities charge the lowest pole rates to CATV pole users. CATV industry representatives indicate only a few instances where municipally owned utilities are charging unsatisfactorily high pole rental fees. These rates presumably reflect what local authorities and managers of customer-owned cooperatives regard as equitable distribution of pole costs between utilities and cable television systems.

As to municipally owned utilities, in many cases the same local entity—the city council—is responsible finally for

granting CATV franchises, and setting pole rates and electric and CATV subscriber rates. There are today approximately 2,228 local jurisdictions owning local public power systems. Of these, about 2,112 have the authority to grant CATV franchises as well, and about half or 1,008 of these municipal power systems have granted cable franchises. Thus these localities are in the best position to determine the respective responsibilities of pole users for the costs of erecting and maintaining these facilities.

Cooperatively owned utilities, by and large, are located in rural areas where often over-the-air television service is poor. Thus the customers of these utilities have an added incentive to foster the growth of cable television in their areas. Many stockholders of power or electric cooperatives also subscribe to cable television systems. Moreover, the Rural Electrification Administration of the Department of Agriculture advises this committee that over 60 percent of existing REA loan recipient plant is buried underground, mostly in trenches, and that approximately 95 percent of all new plant is being buried under-ground. Therefore, as to most cooperative utilities, CATV pole attachment arrangements are unnecessary since there are no leasing agreements associated with use of trenches.

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Railroads likewise play an insignificant role in CATV pole attachment matters and are also exempt from FCC regulation under S. 1547, as reported. It is not the committee's intention that S. 1547, as reported, should affect in any way existing circumstances regarding CATV pole attachments on Indian lands.

FCC INTERIM RATE-SETTING FORMULA

S. 1547, as reported, sets forth a rate-setting formula to be employed by the Commission in determining whether the rates for CATV pole attachments in any particular case are just and reasonable. The formula describes a range of

permissible rates between "additional costs" and a proportionate share of the "operating expenses and actual capital costs" of the utility pole. In essence, the standard permits the contracting parties, or the Commission, to deter mine a CATV pole attachment, rate somewhere between avoidable costs and fully allocated costs.

The level of pole attachment fees is intimate1y connected with the terms and conditions of pole space leasing agreements. The reasonableness of a utility's pole attachment practices must be judged with reference to the compensation that it receives from cable companies for the service provided. For example, a pole attachment fee designed to recover all of the utility's fully allocated costs might justify giving cable operators all of the rights with respect to poles as other utility users, subject only to the higher priority that exists for the maintenance of telephone and electric service. Alternatively, a fee designed to recover only the utility's avoidable costs, which could be expected to be minimal since most of those costs are the outlays that should be fully recovered in the make-ready charges, would justify treating cable as a clearly secondary use subordinate in every respect to the provision of electric and telephone service. This interim formula reflects a belief that the annual pole attachment fee should be set somewhere between avoidable and fully allocated costs in order to avoid inhibiting the growth of cable television and to insure that cable operators and their subscribers make some equitable contribution to the fixed costs of the utility systems they use.

The term "additional costs" means those costs which would not be incurred by the pole owner or controller "but for" the CATV attachment. Within this category would fall such items as preconstruction survey costs and engineering, make-ready, and change-out costs 'ncurred in preparing the utility pole for the CATV attachmer .. Make-ready costs are those necessary to rearrange existing telephone and power lines to maintain

clearances between different pole lines required by individual utility construction and safety standards and national electrical safety codes and to reinforce poles when necessary to increase load capacity. In a few limited instances it may be necessary for the utility to replace an existing pole with a larger facility in order to accommodate the CATV user. In those cases it would be appropriate to charge the CATV user a certain percentage of these pole "change-out" replacement costs, sometimes referred to as the "nonbetterment costs." All of these costs arise solely by virtue of the CATV occupation of space within the commnications space on the pole.

The term "operating expenses and actual capital costs of the utility," as used in S. 1547, as reported, refers to the costs to the utilities, irre-

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spective of the CATV attachment, of owning and maintaining poles. Such costs include interest on debt, return on equity (profit) depreciation, taxes, administrative and maintenance expenses. There will remain some dispute, it is anticipated, as to whether a particular capital or expense item is "attributable" to the pole or whether a determination of rates based on future as opposed to embedded costs is appropriate. For example, maintenance expenses of utility pole crews may be difficult to assign where the same crew performs functions other than maintaining utility poles. Likewise, general office salaries and expenses may not be susceptible to clear attribution to pole maintenance categories. Further, there may be some difficulty in determining the components of "actual" capital costs. As to some of these factors the committee expects that the Commission will have to make its best estimate of some of the less readily identifiable actual capital costs. Special accounting measures or studies should not be necessary.

The committee is advised that the majority of cost and expense items attributable to utility pole plant are already

established and that publicly available accounts reflecting total annual pole costs are filed by utilities with the various regulatory agencies with ratemaking jurisdiction over their activities. Since the rate-setting formula set forth in S. 1541, as reported, merely establishes a methodology for assigning pole costs, however determined, under applicable accounting procedures, the committee sees no need for the Commission to establish a separate system of accounting to determine operating expenses and capital costs attributable to poles, or to reexamine on its own initiative, the reasonableness of the cost methodology made by the utilities and sanctioned by State or local regulatory agencies.

Once these expense items and capital costs are determined, the formula provides a method for determining a maximum portion of these total pole costs which may be assigned to the CATV system. The allocation formula provides that a cable system may bear a proportionate share of the total pole costs in exactly the same proportion that its attachment and attendant clearances take up usable space. By way of example, on a typical utility pole 35 feet in length there are 11 feet of usable space (that space above minimum grade level clearance used to attach cable, telephone, and electric wires and associated equipment). By what is virtually a uniform practice throughout the United States, cable television is assigned 1 foot out of the 11 feet of usable space. (While cable only physically occupies approximately 1 inch of this space, the clearance space between CATV and the next adjacent pole user is attributed to CATV.) Cable's share of the total capital costs and operating expenses for the entire 35-foot pole would be one-eleventh. Cable would pay its share of not just the costs of the 11 feet of usable space but of the total costs of the entire pole including the unusable portion (below grade level, and between grade and minimum clearance levels). This allocation formula reflects the concept of relative use of the entire facility. To the extent that a pole is used for a particular service in greater proportion than it is

used for another service, the relative costs of that pole are reflected proportionately in the costs of furnishing the service which has the greater amount of use.

In regard to the rate-setting formula set forth in S. 1547, as reported, the committee wishes to make one point very clear. The particular

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methodology selected in this bill is only one of many plausible approaches to assigning pole costs to a CATV system, and should not be considered to reflect the committee's judgment that allocation of pole costs according to relative use is the optimal methodology. The committee's decision to incorporate a specific rate-setting formula in S. 1547, as reported, is based entirely on the following considerations: To assist the Federal Communications Commission during the first few years of regulation in this new area; and to provide the Commission with a sense of congressional intent as to the meaning of the term "just and reasonable rate," so as to avoid lengthy initial proceedings at the Commission to determine what just and reasonable CATV pole attachment rates should be. The rate-setting formula of S. 1547, as reported, should be regarded as an interim measure only, having no precedential effect whatsoever on other rate-setting responsibilities of the Commission. Nor should this interim formula be deemed to reflect the committee's preference that the Commission indefinitely employ this particular methodology or the underlying concept of relative use in the instant case of CATV pole attachments. A 5-year termination of this formula is imposed to afford the Commission greater leeway to select a more appropriate methodology should experience and changed conditions so dictate. After this 5-year period the Commission would be guided by the "just and reasonable" statutory standard.

The bill as reported sets forth no specific guidelines to the Commission to determine whether any term or condition for

CATV pole attachments is just and reasonable. Such terms and conditions usually include matters relating to inspections, extent and duration of license, liability for a portion of future capital costs, insurance, surety bonds, lease revocation and like matters. The committee believes that the open standard of "just and reasonable" is at the same time sufficiently precise and flexible to permit the Commission to make determinations when presented with specific contractual provisions alleged to be excessively onerous or unfair. In any event, the fairness of any term or condition of a CATV pole-leasing agreement. will have to be judged in relation to other contract provisions, prevailing practices in the industries involved, and the particular pole rate charges, matters which cannot be precisely translated into statutory language.

FCC CATV POLE ATTACHMENT REGULATORY PROCEDURES

The committee desires that the Commission institute a simple and expeditious CATV pole attachment program which will necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient regulation.

Since S. 1547, as reported, does not define the provision of pole attachments as a common carrier service, the full panoply of regulatory procedures and enforcement mechanisms provided in title II of the Communications Act of 1934 as reported would not automatically extend to utilities subject to FCC pole attachment regulation. The bill as reported affords the Commission discretion to select the regulatory tools necessary to carry out its new responsibilities consistent with the simple complaint procedure specified in the bill as reported, S. 1547, as reported charges the Commission to develop after an appropriate

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rulemaking proceeding, a flexible program to adjudicate complaints relating to CATV pole attachment rates, terms, or conditions. The Commission's adjudicatory authority would

not come into play until a complaining party has brought a matter to the Commission's attention. After hearing the complaint and responsive pleadings, if the Commission determines that a particular rate, term, or condition is unjust or unreasonable, it shall take any action it deems appropriate and necessary, including ordering the parties to undertake further negotiations to arrive at a just and reasonable settlement of the dispute to their mutual satisfaction. Alternatively, the Commission may order a party to show cause why it should not cease and desist from practices found to he unjust or unreasonable.

The Commission may by rulemaking establish regulations governing the form and content of complaints relating to CATV pole attachments, including requirements that the complaining party establish prima facie the unjustness or unreasonableness of any rate, term, or condition and show that the parties involved are unable to resolve the matter themselves and that all available State or local administrative remedies have been exhausted. To assist parties in their private resolution of CATV pole attachment disputes, the Commission may publish guidelines to be used in determining whether a particular rate, term, or condition would be just and reasonable.

The Commission may also prescribe such rules as it deems appropriate relating to the conduct of the complaint procedure established by the bill as reported. Such rules may include such matters as assignment of the burden of proof on contested rates, terms, and conditions, or on such documentation offered by a utility to justify any rate, term, or condition under challenge.

In determining the lawfulness of a utility's rates, terms, and conditions for CATV pole attachments, the Commission may accept in whole or in part the depreciation rates, property valuations, systems of accounts, rates of return and the like established or determined by any State or local agency or any

agency of the Federal Government. It is not the intent of S. 1547, as reported, to require the Commission to embark upon a large-scale ratemaking proceeding in each case brought before it, or by general order. It would be extremely difficult for the Commission to attempt such a task. The annual charges for poles vary from one region of the country to another, from one company to another within a region, and within one company by reason of particular historical patterns of development, acquisition, accounting and construction practices, and the varying terms of joint user agreements with other utilities. Any general ratemaking principles which did not take into account such factors would be inherently inefficient, as well as unfair. Rather, the FCC is to focus more narrowly on the just and reasonable assignment of utility pole costs to the CATV user. Among those costs are the utility's rate of return and other capital cost factors, which will already have been established by a State or local agency. There is no need for the Commission to make independent determinations as to each element of a utility's annual pole costs, as S. 1547, as reported, merely requires the Commission to follow, for an interim period of 5 years, a method for assigning pole costs, however determined under applicable accounting procedures.

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SECTION-BY-SECTION ANALYSIS

Section 1

This section sets forth the short title of the bill—the "Communications Act Amendments of 1977".

* * *

Section 5.

This section modifies existing section 2(b) of the Communications Act of 1934 (47 U.S.C. 152(b)) which limits the jurisdiction of the Commission over connecting carriers to

sections 201 through 205 of title II of the act. Since section 6 of S. 1547, as reported, would give the Commission CATV pole attachment regulatory authority over connecting communications common carriers otherwise exempt from the provisions of the 1934 act as noted above, a conflict arises between the limitation on the Commission's jurisdiction of section 2(b) and its duty to regulate under proposed new section 224, set forth in section 6 of S. 1547, as reported. Section 5 of S. 1547, as reported, removes this conflict by removing the jurisdictional limitations of section 2(b) as they would otherwise apply to proposed section 224.

Section 6.

This section adds a new section 224 to title II of the Communications Act of 1934, as amended, relating to regulation by the Commission of the provision of pole attachment space to cable television systems by owners and controllers of utility poles. Subsection (a) of proposed section 224 sets forth definitions of terms used in the succeeding subsections. The term "utility" is defined to include entities such as electric power and telephone companies whose rates or charges are regulated by Federal, State, or local bodies. If such a utility owns or controls utility poles used for wire communication, it is subject to the jurisdiction of the FCC for purposes of section 224. "Wire communication" is defined in section 3 (a) of the 1934 act (47 U.S.C. 153(a)). Certain of such utilities are exempted from the provisions of section 224 : Railroads, municipally owned power systems, electric and telephone cooperative companies, and like entities owned by the Federal Government, any State, or any political subdivision, agency or instrumentality of any State. The term "pole attachment" is defined to mean the attachment of the cables of a CATV system to a pole or occupation of a duct or conduit, or other right-of-way owned or controlled by a utility. Duct or conduit systems consist of underground reinforced passages for electric and communications facilities

as well as underground dips, lateral members, hand holes, splicing boxes, or pull boxes.

Subsection (b) of this section directs the Commission to regulate the rates, terms, and conditions whereby CATV systems attach their cable distribution facilities to poles owned or controlled by utilities. The Commission regulations shall provide that such matters are just and reasonable to all pole users. Subsection (b) also directs the Commission to adopt rules and regulations to implement its regulatory authority within 180 days from the date of enactment. This subsection requires the Commission to adopt procedures to adjudicate complaints relating to CATV pole attachments and directs the Commission to take appropriate action upon a finding that a particular rate, term, or condition for pole attachments is unjust or unreasonable. Among other ac-

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tions the Commission may order a party violating the provisions of this section to cease and desist from further violation, pursuant to existing cease and desist provisions of the Communications Act of 1934, as amended.

Subsection (c) of this section restricts the jurisdictional reach of the Commission's pole attachment authority. The Commission shall have no such authority in any State which regulates the rates, terms, and conditions for pole attachments. A State may recapture pole attachment jurisdiction at any time simply by notifying the Commission that it regulates the matters encompassed by this section. Such notification would have the effect of automatically preempting the Commission's authority as to CATV pole attachments in that State.

Subsection (d) of this section defines the term "just and reasonable rate" by describing a range within which a reasonable and just CATV pole attachment rate must fall. The lower end of this range would be a rate which reimburses the

utility for its costs borne to accommodate the CATV pole attachment, costs which it would not have incurred but for the presence of CATV cable on its poles. The upper end of this range is expressed in terms of a charge to the CATV pole user which reflects its proportionate share of the total costs of the pole, such total costs being the recurring operating expenses and capital costs attributable to the utility pole. Cable's proportionate share would be calculated by determining the percentage of usable space used by the CATV system (*i.e.* the actual physical attachment plus clearance space between the CATV attachment and adjacent attachments) and multiplying that percentage by the total of the capital costs and operating expenses of the entire pole.

Subsection (e) of this section limits the effectiveness of the rate-setting formula set forth in subsection (d) to 5 years. Thereafter the Commission shall be guided by the "just and reasonable" standard set forth in subsection (b) of this section.

Section 7.

This section provides that these amendments shall take effect 30 days after the date of enactment. Any act or omission which occurs prior to the effective date of this act shall continue to be subject to forfeiture under the provisions of section 503 (b) and 510 as then in effect.

REGULATORY IMPACT STATEMENT

S. 1547, as reported, would expand the scope of the Commission's regulation in several significant respects. As to that portion of the bill relating to forfeitures, the Commission's authority to fine persons or businesses found to violate the provisions of the Communications Act of 1934, Commission rules, and related matters, would extend to entities not previously subject to such forfeiture authority. The Commission already exercises regulatory oversight of the activities of most of these entities. S. 1547, as reported,

provides the Commission with an additional enforcement mechanism to assure compliance by these entities with existing rules and regulations applicable to their communications-related activities.

As to the pole attachment regulation sections of S. 1547, as reported, the Commission would be granted regulatory authority over entities

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and persons not previously subject to FCC jurisdiction, such as electric power companies, and would expand the scope of the Commission's existing jurisdiction over communications entities (telephone companies) whose interstate practices are already subject to FCC regulatory supervision. Railroads and several types of entities which fall within the overall categories of electric power and telephone utility companies are exempted from the Commission's pole attachment regulation (publicly owned power companies, cooperatively organized telephone and power companies). It is estimated that at least 122 investor-owned electric power companies presently have pole attachment agreements with cable television systems. In addition to the Bell System operating companies, there are an estimated 1,600 independent telephone companies which may fall under FCC pole attachment jurisdiction. The Federal Communications Commission estimates that currently there are 7,800 CATV pole attachment contracts in effect, most of which involve entities not specifically exempted from S. 1547, as reported.

S. 1547, as reported, contemplates the assumption by the States of CATV pole attachment regulation, resulting concurrently in preemption by such States of FCC involvement in CATV pole attachment matters in those States. Accordingly, the extent of the Commission's regulatory responsibilities in this area should gradually diminish. It is not possible at this time to estimate the number of States which will eventually recapture CATV pole

attachment jurisdiction from the Commission. At present there are about 15 States which could take such action without enacting special legislation or taking other necessary initial steps.

The committee has been unable to obtain specific predictions of the economic impact on businesses or individuals affected by this bill. The committee has no reason to believe that there will be any impact on personal privacy of businesses or individuals as a result of enactment of S. 1547, as reported. FCC paperwork requirements would not be substantially increased as a result of granting the Commission expanded forfeiture authority. While the Commission's new CATV pole attachment authority might require some increased paperwork as a result of regulations prescribed pursuant to this bill, the committee estimates that such paperwork will gradually diminish as the Commission's initial implementation of CATV pole attachment regulation becomes settled, and as the States act to implement their own CATV pole attachment regulatory plans, thereby replacing FCC involvement in situations where State plans exist.

No additional recordkeeping requirements would be imposed on entities subject to expanded FCC forfeiture authority as a result of this bill. No significantly increased recordkeeping burdens would necessarily fall on entities subject to FCC CATV pole attachment jurisdiction. The 'bill contemplates that the Commission may accept all relevant data and records which affected electric power and telephone companies file or maintain with the various State or local public utility commissions which otherwise regulate the practices of these entities. Furthermore, the bill directs the Commission to institute a simple complaint procedure to adjudicate CATV pole attachment matters on a case-by-case basis, and does not require the Commission to engage in a large scale regulatory program.

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ADDENDUM B

REGULATIONS OF POLE ATTACHMENTS AND PENALTIES AND FORFEITURES

September 20, 1976—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. Staggers, from the Committee on Interstate and foreign Commerce. Submitted the following

REPORT

Together with ADDITIONAL VIEWS

[To accompany H.R. 13372]

[Including cost estimate of the Congressional Budget Office]

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H.R. 15372) to amend the Communications Act of 1934 to provide just and reasonable rates, terms and conditions for the use of certain rights-of-way by persons desiring to lease space for wire communication, and with respect to penalties and forfeitures, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

Strike out all after the enacting clause and insert in lieu thereof the following:

REGULATION OF POLE ATTACHMENTS

Section 1. Title II of the Communications Act of 1934 is amended by adding at the end thereof the following new section:

"REGULATIONS OF POLE ATTACHMENTS

"Sec. 224. (a) As used in this section:

"(1) The term 'utility' means any person whose rates or charges are regulated by a State or any political subdivision, agency, or instrumentality thereof, or the Federal Government and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communication. Such term does not include any railroad, any person which is cooperatively organized, or any person owned by the Federal Government of any State or political subdivision, agency, or instrumentality thereof.

"(2) The term 'Federal Government' means the Government of the United States or any agency or instrumentality thereof.

"(3) The term 'pole attachment' means any attachment for wire communication on a pole, duct, conduit, or other right-of-way owned or controlled by a utility.

"(b) (1) Except as otherwise provided in paragraph (3) of this subsection, the Commission shall regulate the rates, terms, and conditions for pole attachments. The Commission shall promulgate regulations to provide that such rates, terms, and conditions are just and reasonable.

"(2) Regulations promulgated under paragraph (1) shall not take effect until the expiration of the 9-month period which begins on the date of enactment of this section. Except as otherwise provided by law, the States shall have the opportunity, during such 9 month period and, consistent with the provisions of this section, at any time thereafter, to assert jurisdiction over the rates, terms, and conditions for pole attachments.

"(3) The Commission may not require any utility to provide any pole attachment if the utility has determined that any such attachment should not be permitted due to a matter

not subject to the regulations issued under paragraph (1) of this subsection.

"(4) The Commission shall consult with the advisory board established pursuant to subsection (d) in the promulgation of the regulations under paragraph (1).

"(C) (1) Any State may apply to the Commission, in such form as the Commission shall prescribe, to exempt rates, terms and conditions of pole attachments from the authority of the Commission under subsection (b) (1) and regulations promulgated by the Commission under such subsection. The Commission shall review any such application and make a final determination thereon not later than 3 months after the date of receipt by the Commission of such application. Failure of the Commission to make a final determination within 3 months after the date of receipt of such application shall be deemed to constitute approval for purposes of this section.

"(2) The Commission shall approve the application submitted under paragraph (1) and exempt the rates, terms. and conditions for pole attachments in any State from the authority of the Commission under subsection (b) (1) and regulations promulgated under such subsection if the Commission finds that such State regulates rates, terms, and conditions for pole attachments in a manner designed to provide just and reasonable rates, terms, and conditions for pole attachments in such State. In exercising its authority under this subsection, the Commission may not specify rates, terms, or conditions.

"(3) The Commission, upon request of an interested person, may review any State pole attachment regulatory program which has been exempted from the authority of the Commission under subsection (b) (1) and regulations promulgated under such subsection and, after affording notice and an opportunity for submission of written data, views, and

arguments in accordance with section 553 of title 5, United States Code, withdraw such approval if it finds that such State no longer qualifies for exemption on the grounds stated in paragraph (2). For purposes of this paragraph, the term 'interested person' means any person who has made or seeks to make a pole attachment, or any utility.

"(d) The Commission shall establish an advisory board to assist the Commission in the promulgation of the regulations under subsection (b) (1). Such Board shall include—

"(1) the Chairman of the Federal Power Commission or his delegate: and

"(2) at least one representative of State regulatory authorities nominated by the national organization of State commissions, as referred to in section 410(c) of this Act, and approved by the Commission.".

PENALTIES AND FOREITURES

Sec. 2. (a) Section 503(h) of the Communications Act of 1934 (47 U.S.C. 503 (b)) is amended to read as follows:

"(b) (1) Any person who is determined by the Commission. in accordance with paragraph (3) or (4) of this subsection to have—

"(A) willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission:

"(B) willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act or under any treaty, convention, or other agreement to which the United States is a party and which is binding upon the United States;

"(C) violated any provision of section 317(c) or 509(a)(4) of this Act; or

"(D) violated any provision of section 1304, 1343, or 1464 of title 18, United States Code;

shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this subsection shall be In addition to any other penalty provided for by this Act: except that this subsection shall not apply to any conduct which is subject to forfeiture under title II, part II or IiI of title III, or section 307 of this Act.

"(2) The amount of any forfeiture penalty determined under this subsection shall not exceed 2.000 for each violation. Each day of a continuing violation shall constitute a separate offense. but the total forfeiture penalty which may be imposed under this subsection. for acts or omissions described in paragraph (1) of this subsection and set forth In the notice required under paragraph (3) or the notice of apparent liability required by paragraph (4) shall not exceed—

"(A) $20.000 if the violator is (i) a common carrier subject to the pro-visions of this Act. (ii) a broadcast station licensee or permittee, or (iii) a cable television operator ; or

"(B) $5.000, in any case not covered by subparagraph (A). The amount of such forfeiture penalty shall be assessed by the Commission, or its designee, by written notice. In determining the amount of such a forfeiture penalty, the Commission or its designee shall take into account the nature, circumstances, extent, and gravity of the prohibited acts, committed and. with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.

"(3) (A) At the discretion of the Commission, a forfeiture penalty may be determined against a person under this subsection after notice and an opportunity for a hearing before the Commission or an administrative law judge thereof in accordance with section 334 of title 5, United States Code. Any person against whom a forfeiture penalty is determined under this paragraph may obtain review thereof pursuant to section 402(a).

"(B) If any person fails to pay an assessment of a forfeiture penalty determined under subparagraph (A) of this paragraph. after it has become a final and unappealable order or after the appropriate court has entered final judgment in favor of the Commission. the Commission shall refer the matter to the Attorney General of the United States, who shall recover the amount assessed in any appropriate district court of the United States. In such action, the validity and appropriateness of the final order imposing the forfeiture penalty shall not be subject to review.

"(4) Except as provided in paragraph (3) of this subsection. no forfeiture penalty shall be imposed under this subsection against any person unless—

"(A) the Commission issues a notice of apparent liability, in writing, with respect to such person:

"(B) such notice has been received by such person, or the Commission has sent such notice to the last known address of such person, by registered or certified mail : and

"(C) such person is granted an opportunity to show, in writing, within such reasonable period of time as the Commission prescribes by rule or regulation, why no such forfeiture penalty should be imposed. Such a notice shall (i) identify each specific provision, term, and condition of any Act, rule, regulation, order, treaty, convention, or other agreement, license, permit, certificate, instrument, or authorization which such person apparently violated or with

which such person apparently failed to comply: (ii) set forth the nature of the act or omission charred against such person and the facts upon which such charge is based: and (iii) state the date on which such conduct occurred. Any forfeiture penalty determined by the Commission under this paragraph shall be recoverable pursuant to section 504(a) of this Act.

"(5) No forfeiture liability shall be determined under this subsection against any person, if such person does not hold a license, permit, certificate, or other authorization issued by the Commission, unless, prior to the notice required by paragraph (3) of this subsection or the notice of apparent liability required by paragraph (4) of this subsection, such person (A) is sent a citation of the violation charged: (B) is given a reasonable opportunity for a personal inter-view with an official of the Commission, at the field office of the Commission which is nearest to such person's place of residence : and (C) subsequently engages in conduct of the type described in such citation. The provisions of this Paragraph shall not apply, however, if the person involved is engaging in activities for which a license, permit, certificate, or other authorization is required. Whenever the requirements of this paragraph are satisfied with respect to a particular person, such person shall not be entitled to receive any additional citation of the violation charged, with respect to any conduct of the type described in the citation sent under this paragraph.

"(6) No forfeiture penalty shall be determined or imposed against any person under this subsection if—

"(A) such person holds a broadcast station license issued under title III of this Act and if the violation charged occurred—

"(i) more than one year prior to the date of issuance of the required notice or notice of apparent liability ; or

"(ii) prior to the date of commencement of the current term of such license,

whichever is earlier so long as such violation occurred within 3 years prior to the date of issuance of such required notice ; or

"(B) such person does not hold a broadcast station license issued under title III of this Act and if the violation charged occurred more than one year prior to the date of issuance of the required notice or notice of apparent liability."

(b) The first senesce of section 504 (a) of such Act is amended by inserting immediately after "recoverable" the following: "except as otherwise provided with respect to a forfeiture penalty determined under section 503(b) (3) of this Act."

(c) Section 504(b) of such Act is amended (1) by striking out "parts II and III of title III and section 503(b), section 507, and section 510" and inserting in lieu thereof "title II, parts II and III of title III, and sections 503(b) and 507"; and (2) by striking out ", upon application therefor,".

(d) Section 510 of such Act is repealed in its entirety.

EFFECTIVE DATES

Sec. 3. (a) The amendment made by section 1 of this Act shall take effect on the date of enactment of this Act.

(b) The amendments made by section 2 shall take effect on the thirtieth day after the date of enactment of this Act except that the provisions of sections 503 (b) and 510 of the Communications Act of 1934, as in effect on such date of enactment, shall continue to constitute the applicable law with respect to any act or omission which occurs prior to such thirtieth day.

PURPOSE AND SUMMARY OF THE BILL

The bill (H.R. 15372) would amend the Communications Act of 1934 (1) to provide just and reasonable rates, terms,

and conditions for the use of certain rights-of-way by persons desiring to lease space for wire communication, and (2) with respect to penalties and forfeitures.

BACKGROUND AND NEED FOR LEGISLATION

POLE ATTACHMENTS

In the cable television (CATV) industry, the CATV system operator usually attaches his coaxial cable to existing utility company poles. These poles are usually owned by telephone companies and electric utilities which often enter into joint use or joint ownership agreements for the use of each other's poles. These agreements commonly reserve a portion of each pole for the use of communication services. Regardless of who owns the pole, telephone companies usually control the connection space set aside for communication services. It is a part of this portion of the pole that is leased to CATV system operators.

In many communities, because of the lack of available rights-of-way, environmental restrictions, or zoning laws, the CATV operator is unable to construct his own pole plant for the attachment of his coaxial cable. A CATV operator who is unable to use his own pole plant must seek to use existing utility company poles. If the operator is unable to negotiate an acceptable contract with the owners of these poles, he has no legal forum to hear his complaint except in those few States that have assumed jurisdiction over this issue.

The most egregious situation of an impasse in pole attachment rate negotiations occurred on June 8, 1976, when over 1,200 residents in the communities of Dunn, Irwin, Whiteville, and Chadborne, North Carolina, were deprived of CATV service. The concerned utility company forcefully disconnected from its poles the coaxial cable of the CATV operator which was used to provide these residents with CATV service. This bill will make avail~~able to parties~~ such as these, a forum to hear their differences.

The Federal Communications Commission has had pending since 1966 the question of the nature and extent of its jurisdiction over CATV pole attachments. In 1973, the Commission terminated the evidentiary phase of these proceedings and invited comment on and designated for oral argument the issue of the nature and extent of the Commissions jurisdiction over the policies and practices of pole rental charges to CATV operators by telephone common carriers and other utilities.

On September 29, 1975, some of the interested parties to the proceedings on pole attachments at the Commission, the National Cable Television Association (NCTA) and the American Telephone and Telegraph Company (A.T.& T.) entered into an agreement respecting the pole attachment rates charged CATV companies. To aid interested parties who were not part of that settlement and who were negotiating or renegotiating pole attachment agreements, the Commission released a formula which was devised by the Commission staff. Many parties were unable to reach mutual accord over pole rental charges.

On July 1, 1976, the Commission adopted a decision that (1.) concluded the Commission lacks jurisdiction over pole attachment agreement for non-telephone utility poles and (2) instructed its staff to study the jurisdictional, and economic issues involved in the charges, terms, and conditions by which space on telephone poles is leased to CATV systems. Several members of the Commission recognized that Congressional action was necessary in order to reach an ultimate and satisfactory resolution of the pole attachment problem. Approximately 50 per cent of the poles carrying CATV cables are power poles rather than telephone poles. Even if the Commission were to assert jurisdiction over the rental of communications space on telephone poles after its proposed study is finished, such action would still leave the

pole attachment issue in an unsettled state. This Committee feels that H.R. 15372 will resolve the pole attachment issues.

The bill is designed to allow a State to assert jurisdiction during the 9-month period beginning on the date of enactment of this bill or any time thereafter, subject to Commission approval. After the termination of the 9-month period, the Commission rules and regulations shall apply in those States that have not commenced Commission approved regulatory programs. Upon application by a State, the Commission will review the State's regulatory plans in order to determine if the State regulates rates, terms and conditions of pole attachments in a manner designed to provide just and reasonable rates, terms and conditions of pole attachments. In exercising this authority, the Commission may not specify rates, terms, or conditions. The Commission, upon request of an interested person, may review any State Pole attachment regulatory program which was exempted from the authority of the Commission and may withdraw its approval if it finds that such State no longer qualifies for exemption from Commission authority and its rules and regulations.

The bill provides that the Commission may not require any utility to provide any pole attachment if the utility has determined that any such attachment should not be permitted due to a matter not subject to the regulations of the Commission. The Committee expects that the Commission will carefully monitor the pole attachment access situation to see that no de facto denial of access occurs due to any unreasonable rate, term, or condition that may be required by a utility of any person seeking such access. It was the view of the Committee that the Commission report to the Congress. within 3 to 6 months of the effective date of its rules, on the effect of its regulatory program on the CATV pole attachment issue.

PENALTIES AND FORFEITURES

The FCC sought legislation, as part of its legislative program for the 94th Congress amending the Communications Act of 1934 to unify, simplify and make more effective the provisions of sections 503(b), and 510 relating to forfeitures. The legislation was introduced as H.R. 10620 in the House, and an identical bill, S. 2343, was introduced in the Senate. On June 11, 1976 the Senate passed S. 2343, as amended, and the bill was sent to the House and referred to this Committee. Section 2 of H.R. 15372 represents the bill as passed by the Senate except for certain technical changes. It is also substantially the same as H.R. 10620.

The objective of section 2 is to modernize certain of the forfeiture provisions of the Communications Act and to enlarge their scope to cover persons who are currently subject to the Act but not presently subject to the forfeiture provisions, such as cable television systems, users of certain experimental or medical equipment and some communications equipment manufacturers. The changes made by Section 2 will also enable the FCC to enforce their rules more effectively.

The FCC is empowered to revoke station licenses or construction permits; and to issue cease and desist orders for violations of the Act of a Commission rule (section 312) and to suspend operator licenses (section 303(m)) However. Congress recognized that the Commission needed an alternative enforcement tool which could be used to deal with violations which did not warrant the revocation or denial or renewal of a license. Thus, in 1960, Congress enacted legislation which gave the Commission the ability to impose forfeitures or monetary penalties for violations of the Act or a Commission rule by broadcast Licensees or permittees (section 503(b), 74 Stat. 889). In 1962, Congress further amended the Act to allow the Commission to impose

forfeitures in certain instances on non-broadcast radio licensees (section 510 Stat. 68).

The amendments to the Act made by section 2 of H.R. 15372 are consistent with the policy of the Congress to enable the Commission to deal effectively with violations. The Committee has determined that the forfeiture authority of the FCC requires common procedures and uniform sanctions for dealing with broadcast entities, cable television systems, common carriers, and other persons subject to its jurisdiction. In addition, non-broadcast radio licenses are brought under the provisions of section 503(b).

The Committee believes that the revisions contained in section 2 of H.R. 15372 are necessary in order that the FCC have the ability to enforce its rules in an effective yet flexible manner. Enforcement mechanisms other than forfeiture are time-consuming and involve expensive procedures, both for the person charged with a violation and for the Commission and the Government generally. In addition, the FCC has encountered some problems with the Justice Department in referring matters for prosecution (either for civil contempt or for criminal violations) because of the relatively low priority which those matters are afforded. As a result, these other enforcement mechanisms are not effective deterrents to certain types of misconduct.

H.R. 15372 carefully balances the Commission's need for an effective enforcement tool with the right to due process of those persons subject to the Commission's jurisdiction. Forfeiture liability arises only after there has been: (1) written notice of apparent liability (actual or constructive) (2) an opportunity to contest or mitigate liability in writing (3) in the case of a person not holding a license or certificate from the Commission, an opportunity for personal interview, and (4) consideration of any response by the Commission prior to the issuance of an order of liability. If the person against whom the order runs desires to appeal, he has the option of refusing

to pay and seeking de novo review in the Federal District Court. In addition to this streamlined procedure, the FCC can, within its discretion, set the matter for a full adjudicatory hearing in accordance with section 534 of the Administrative Procedure Act. Your Committee believes that either the "show-cause" procedure or the full adjudicatory hearing procedure adequately serves the rights of the persons involved.

Furthermore, forfeiture provides a less severe alternative to revocation or suspension of licenses and a more feasible alternative to cease and desist orders or judicial enforcement against persons who are not required to hold a license and against whom, therefore, license revocation or suspension is not an available penalty.

Your Committee believes that the Commission needs increased maximum fines in order to make the forfeiture procedure a more effective deterrent. The history of the Commission's use of its existing forfeiture authority suggests that it has tailored the fines levied to the nature of the offense and to the ability of the offender to pay. The Commission policy has not been to assess forfeitures at the statutory maximum but rather to consider a series of mitigating factors such as those set. forth in subsection (b) (2). Your Committee expects that the Commission will continue to exercise careful discretion.

There is concern on the part of some cable television system operators that they will be unfairly treated or harassed by the Commission. While the Committee found no evidence that the Commission or any other person has abused the forfeiture authority in the past, the Committee intends to watch closely to see that no such abuse takes place under the new authority provided by H.R. 15372. The Committee fully expects that the FCC will not use this authority in an arbitrary or capricious manner and has provided procedural safeguards according. However, your Committee also expects that the

Commission will vigorously enforce its rules and that all persons subject to Commission jurisdiction will observe those rules, so as not to frustrate and impede the policy and purposes of the Communications Act.

In sum, the expanded forfeiture authority contained in H.R. 15372 is imperative if the FCC is to carry out its mandate under the Communications Act. This comprehensive revision of the forfeiture provisions helps assure greater compliance with the law and substantially benefits persons regulated under the Act and the public as a whole.

COMMITTEE ACTION

The Committee, acting through its Subcommittee on Commmunications, held one day of hearing on July 28, 1976, on H.R. 10620, a bill submitted by the Federal Communications Commission dealing with penalties and forfeitures. And one day of hearings on September 1, 1976, on H.R. 15268 a bill dealing with pole attachments. In addition, the Subcommittee took testimony on pole attachments during hearings on July 28, 1976, on cable television. In the course of these hearings, testimony was taken from representatives of organizations and companies involved in the public utility industry and the CATV industry. Written comments were received from the FCC.

The Subcommittee on Communications met in open mark-up session on September 8, 1976, to consider H.R. 15372 and reported the bill, with amendments to the full Committee.

H.R. 15372 was ordered reported to the House by the Committee on September 16, 1976, by a voice vote while a majority of the Committee was present.

COMMITTEE AMENDMENT

The Committee amendment was an amendment in the nature of a substitute to the text of H.R. 15372 as introduced. The text of the amendment is printed in italics in the reported bill.

SENATE ACTION

The Senate passed S. 2343, a bill dealing with penalties and forfeitures, on June 11, 1976.

SECTION-BY-SECTION ANAYLSIS

SECTION 1

The Communications Act of 1934 is amended by adding a new section (section 224). The Commission shall regulate the rates terms and conditions for pole attachments. The Commission shall promulgate regulations to provide that such rates, terms, and conditions are just and reasonable. The regulations promulgated by the Commission shall not take effect until the expiration of the 9-month period which begins on the date of enactment of this section. Except as otherwise provided by law, the States shall have the opportunity, during this 9-month period and at anytime thereafter to assert jurisdiction over the rates, terms, and conditions for pole attachments subject to the approval of its State regulatory program by the Commission. The Commission may not require any utility to provide any pole attachment if the utility has determined that any such attachment should not be permitted due to a matter not subject to the regulations issued by the Commission. The Commission shall consult with an advisory board which shall include the Chairman of the Federal Power Commission or his delegate and at least on representative of State regulatory authorities nominated by the national organization of State commissions and approved by the Commission.

Any State may apply to the Commission in such form as the Commission shall prescribe to exempt the rates, terms, and conditions of pole attachments in its State from the authority of the Commission. The Commission shall review any such application and make a final determination on such application no later than 3 months after the date of receipt of said application. If the Commission fails to make a final

determination within 3 months after such date, the application shall be deemed to have been approved by the Commission. In approving such application the Commission shall determine if the State regulates rates, terms, and conditions for pole attachments in a manner designed to provide just and reasonable rates, terms, and conditions for pole attachments in that State. In exercising this review authority, the Commission may not specify rates, terms, or conditions. The Commission upon request of an interested person, may review any State pole attachment regulatory program which has been exempted from the authority of the Commission. The Commission may withdraw such approval if it finds that the State no longer qualifies for exemption for Commission authority and its rules and regulations.

SECTION 2

Subsection (a)

This Subsection amends subsection (b) of section 503 of the Communications Act of 1934 (47 U.S.C. 503(b)) to provide as follows:

Paragraph (1) modernizes the provisions of the Communications Act which govern liability for civil penalties (forfeitures). The paragraph provides that any person subject to FCC regulation is liable for a forfeiture. As a result, liability under the Communications Act for civil penalties is extended to many persons not currently liable. Examples include cable systems, users of industrial, scientific, or medical equipment subject to FCC regulation, persons illegally operating without a valid FCC license, and certain communications equipment manufacturers. Liability extends to those who (1) willfully or repeatedly fail to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission. (2) willfully or repeatedly fail to comply with any of the provisions of the Communications Act, or of any lawful rule, regulation, or order of the Federal

Communications Commission or (3) violate the criminal code as it relates to communication by wire or radio.

The liability for forfeitures by broadcasters is unchanged by this legislation. However, persons associated with broadcast activities are made liable for forfeitures for the first time. Examples of violations which would occasion such liability are participation in a rigged contest program (47 U.S.C. 509(a) (4)), the broadcast of lottery information (18 U.S.C. 1304), the commission of fraud by means of radio, or television communications (18 U.S.C. 1343), and the use of obscene language on radio (18 U.S.C. 1464).

The paragraph continues existing law by providing that (1) liability for forfeiture under section 503(b) is in addition to other penalties provided by the Communications Act, (2) conduct subject to other forfeiture provisions of the Act does not invoke liability under section 503 (b) This includes the provisions of Title II (relating to common carriers) those of Title III, parts II and Ill (relating to radio equipment and operations on board ship and radio installations on vessels carrying passengers for hire), and Title 5, section 507 (relating to violation of the Great Lakes Agreement).

Paragraph (2) increases the maximum forfeiture for each violation to $2,000. Previously the maximum was $1,000 for broadcast licensees, $100 for those operating nonbroadcast radio stations, and, of course, nothing for those not previously covered by the forfeiture provisions.

Paragraph (2) also provides that each day of a continuing violation constitutes a separate offense. This is a change for nonbroadcast licensees who were previously subject to only a single forfeiture for any one type of violation. irrespective of the number of violations However, paragraph (2) sets a limit on the total forfeiture penalty imposed for multiple violations set forth in a single notice of $20,000 for common carriers, broadcast station licensees, and cable operators and $5,000 for others.

The Commission is directed to take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and the violator's culpability, prior offenses, ability to pay and other matters as justice may require when it sets the amount of the forfeiture.

Paragraph (3) gives the FCC its choice of using an adjudicatory hearing under section 554 of the Administrative Procedure Act or the traditional written "show cause" proceeding under new paragraph (4). Under this procedural alternative the FCC must issue a notice and grant an opportunity for a hearing before the Commission or an Administrative Law Judge. Once the Commission has reached a final judgment on a forfeiture penalty, the violator may seek judicial review pursuant to section 402(a) of the Communications Art which is the appellate procedure applicable to any final FCC order. Any person who fails to pay the forfeiture penalty after it has become final and unappealable is subject to a collection action in the appropriate District Court of the United States.

Paragraph (4) describes the alternate forfeiture procedure avail able to the FCC. If the FCC chooses to invoke this procedure no forfeiture liability attaches unless a written notice of apparent liability for issued by the Commission and either was actually received or was sent by registered or certified mail to the person's last known address. The notice must specifically identify the particular provision of law, rule, regulation, agreement, treaty, convention, license. Permit certificate, or other authorization or order involved. Additionally, the paragraph retains the current requirement that any person notified be granted an opportunity to show in writing within a reasonable period why he should not be held liable.

Paragraph (5) is new. It provides special procedural protection in addition to the provisions of paragraphs (3) and (4) to everyone except those persons who hold or are engaged

in activities which require an FCC license, permit, certificate, or other authorization from the Commission or any person who is providing any service by wire subject to the Commission's Jurisdiction.

The Commission must first send to such a person a citation of the violation and provide a reasonable opportunity for a personal interview with an FCC official at the FCC field office nearest the person's residence. No forfeiture liability under the amended subsection attaches unless the person has thereafter engaged in the conduct for which the citation of violation was sent. When a person subsequently engages in the same conduct for which he has already been sent a citation and given an opportunity for interview, no further citations need be sent. Any subsequent notice and forfeiture may extend not only to the conduct occurring subsequent to the citation of violation, but also to the initial conduct for which the notice of violation was sent and opportunity for personal interview given.

Paragraph (6) amends the present periods for forfeiture liability. For persons holding a broadcast station license under Title III of the Communications Act, no forfeiture liability attaches for any violation occurring before the current license term or 1 year prior to the date the notice of apparent liability is issued, which ever is earlier. In no event can a notice be issued more than 3 years after the date of the violation. For everyone else, no forfeiture liability attaches to violations 1 year before the date of the notice issued.

Subsection (b)

This subsection conforms subsection 504(a) of the Communications Act to new subsection 503(b) (3). A trial de novo in the Federal District Court will not be necessary in the case of a 303(b) (3) adjudicator proceeding.

Subsection (c)

This subsection amends existing subsection 504(b) of the Communications Act which gives the Federal Commun-

ications Commission authority to mitigate or remit forfeitures. The FCC is given authority to remit or mitigate common carrier forfeitures imposed under Title IT of the Act. It conforms subsection 504(a) to reflect the repeal of section 510 accomplished by subsection (d) and it makes the decision to mitigate or remit forfeitures solely a function of the Commission's discretion by deleting the existing requirement that the person liable must apply for mitigation or remission.

Subsection (d)

This subsection repeals existing section 510 of tile Communications Act which currently provides for forfeitures by nonbroadcast licensees and operators.

All of the offenses enumerated in section 510 are consolidated in amended subsection 503 (b) The notice, limitation, maximum forfeiture amount and show cause procedures are amended and consolidated in proposed subsection 503 (b) as discussed above. The requirement that the FCC provide an opportunity for a personal field interview to nonbroadcast station licensees after issuing a notice of apparent liability is deleted.

SECTION 3

Section 1 of this bill shall take effect upon enactment. Section 2 of this bill shall take effect on the 30th day of enactment except that sections 303(b) and 510 of the Communications Act of 1934, as in effect on the date of enactment, shall continue to constitute the applicable law with respect to any act or omission which occurs prior to the 30th day.

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COMMUNICATIONS ACT OF 1934

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TITLE II—COMMON CARRIERS

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REGULATIONS OF POLE ATTACHMENTS

SEC. 224. (a) As used in this section:

(1) The term "utility" mean any person whose rates or charges are regulated by a State or any political subdivision, agency, or instrumentality thereof, or the Federal Government and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communication. Such term does not include any railroad, any person which is cooperatively organized, or any person owned by the Federal Government or any State or political subdivision, agency, or instrumentality thereof.

(2) The term "Federal Government" means the Government of the United States or any agency or instrumentality thereof.

(3) The term "pole attachment" means any attachment for wire communication on a pole, duct, conduit, or other right-of -way owned or controlled by a utility.

(b)(1) Except as otherwise provided in paragraph (3) of this subsection, the Commission shall regulate the rates, terms, and conditions for pole attachments. The Commission shall promulgate regulations to provide that such rates. terms, and conditions are just and reasonable.

(2) Regulations promulgated under paragraph (1) shall not take effect until the expiration of the 9-month period

which begins on the (late of enactment of this section. Except as otherwise provided by law, the States shall have the opportunity, during such 9-month period and, consistent with the provisions of this section, at any time, thereafter, to assert jurisdiction over the rates, terms, and conditions for pole attachments.

(3) The Commission may not require any utility to provide any pole attachment if the utility has determined that any such attachment should not be permitted due to a matter no subject to regulations under paragraph (1) of this subsection.

(4) The Commission shall consult with the advisory board established pursuant to subsection (d) in the promulgation of the regulations under paragraph (1).

(c)(1) Any State may apply to the Commission, in such form as the Commission shall prescribe, to exempt rates, terms, and conditions of pole attachments from the authority of the Commission under subsection (b) (1) and regulation. ptomulgated by the Commision under such subsection. The Commission shall review any such application and make a final determination thereon not later than 3 months after the date of receipt by the Commission of such application. Failure of the Commission to make a final determination within 3 months alter the date of receipt of such application shall be deemed to constitute approval for purpose of this section.

(2) The Commission shall approve the application submitted under paragraph (1) and exempt the rates, terms, and conditions for pole attachments in any State from the authority of the Commission under subsection (b) (1) and regulations promulgated under such subsection if the Commission finds that such State regulates rates, terms, and conditions for pole attachments in a manner designed to provide just and reasonable rates, terms, and conditions for pole attachments in a manner designed to provide just and

reasonable rates, terms, and conditions for pole attachments in such State. In exercising its authority under this subsection. The Commission may not specify rates terms or conditions.

(3) The Commission, upon request of an interested person. May review any state pole attachment regulatory program which has been exempted from the authority of the Commission under subsection (b) (1) and regulations promulgated under such subsection and, after affording notice and an opportunity for submission of written data, views, and arguments in accordance with section of title 5, United States Code, withdraw such approval if it finds that such State no longer qualifies for exemption on the grounds stated in paragraph (2). For purposes of this paragraph, the term "interested person" means any person who has made or seeks to make a pole attachment, or any utility.

(d) The Commission shall establish an advisory board to assist the Commission in the promulgation of the regulations under subsection (b) (1). Such Board shall include—(1) the Chairman of the Federal Power Commission or his delegate: and

(2) at least one representative of State regulatory authorities nominated by the national organization of State commissions, as referred to in section 410(c) of this Act, and approved by the Commission.

* * * *

Hon. LIONEL VAN DEERLIN,

Chairman, Subcommittee on Communications. Committee on infer-state and Foreign Commerce, House of Representatives, Washington D.C.

DEAR MR. CHAIRMAN: This letter is in response to your request for the Commission's comments on H.R. 15268. This bill, which was introduced on August 25, 1976, would amend

the Communications Act to provide for the regulation of rates for the attachment of interstate communications wires to utility poles. As you know, for the last month the Commission's Office of Plans and Policy has been engaged in a study of the jurisdictional and economic issues involved with regard to pole line attachments. In view of the fact that this study will not be completed until the middle of October and, in light of the extremely limited time afforded to prepare these comments, they cannot be as detailed or fully considered as they might otherwise be. However, we hope that they will be of some value to you in your deliberations.

The Commission has been concerned for several years with issues relating to the attachment of cable television cables to the utility poles of telephone and electric power companies. Because of a strong feeling on the Commission's part that additional regulation should be undertaken only when other alternatives have failed and because of significant questions as to the Commission's jurisdiction in this area, we have sought to encourage the industries involved to find a voluntary means of resolving their disputes. Regardless of the outcome of the proposed legislation, we believe that our efforts in this area have been beneficial to the public.

We believe that a number of questions are raised by the specific provisions of H.R. 15268. For example, section 224 of the proposed act provides the Commission with authority to promulgate rules and regulations which shall assure just and reasonable rates, terms, and conditions for pole attachments and to promulgate minimum standards which a state must meet or exceed if it wishes to continue or commence regulation of pole attachments. In addition, it further provides that the Commission shall accomplish both of these tasks within three moths after the date of enactment of the legislation. This extremely short time frame for the promulgation of rules and standards is simply unrealistic in our belief. In fact, our staff's best estimate of the time

necessary to conclude an orderly rulemaking on this complicated subject is in the neighborhood of at least one year.

Questions are also raised by the bill's lack of specificity as to the intent of a number of its provisions. The bill, is for example, silent with respect to the manner as well as the form which pole attachment regulations by the Commission might take. In this regard, it is unclear whether the bill envisions the adoption by regulation of a ratemaking formula by the Commission which provide for recovery of certain costs and be applied across the board or whether the proposed inclusion of pole line attachment regulation in Title II of the Communications Act implies an intent that the Commission provide a regulatory plan which would require numerous tariff filings. Further, the bill does not provide any answer with respect to the legislative intent as to the "minimum standards" which states would have to "meet or exceed" to take jurisdiction over pole attachment rates. Would it be adequate, for example, for a state simply to charge an agency with the duty of insuring that pole attachment rates are "just and reasonable"? We believe that explanatory language which would provide guidance on these and other issues would be of help to both the Commission and to the states.

A number of other somewhat more technical questions are raised by the specific provisions of H.R. 15268. For example, the term "wire communications" which is defined in section 3 of the Communications Act is a fairly broad term which includes all forms of wire communications, not merely cable television. Thus under the proposed bill, the Commission might be involved in assuring just and reasonable rates for the use of poles by not only cable television system operators, but also by many other users of wire commutations. We understand and that, in addition to cable systems, a large number of other entities utilize space on utility poles. These include public safety uses such as police, fire, and traffic

signalling, in addition to use by communications common carriers such as Western Union. For many years, Western Union and electric utility companies have maintained reciprocal arrangements with the Bell System whereby each is permitted to make use of the other's poles. In Addition to these major users, there are lease arrangements involving railroad signalling, the operation of coal companies and numerous other commercial and noncommercial uses (some involving only one or two poles and others which are far more extensive in nature). It seems certain that the scope of a regulatory program designed to insure just and reasonable rates for the leasing of pole space by all of these entities would be much larger than that necessary to insure just rates for cable systems. We would recommend therefore that if the legislative intent of this bill is merely to remdy pole attachment problems which area importance to the cable television industry, then its application should be so limited, preferably by inserting the term "cable television system" as defined by 47 C.F.R. 76.5(a) in lieu of "wire communication."

Considerable problems might also be caused by the definition of "state" in proposed section 224(a) (2). In that section, the term "state" is defined to include "any State or political subdivision, agency, or instrumentality thereof" which is incidentally somewhat more inclusive than the definition of that term which is found in section 3 of the Communications Act. It is important to bear in mind that under the more inclusive definition appearing in the proposed bill, municipalities, counties, and other political subdivisions theoretically could apply under section 224(c) (1) for authorization to regulate pole attachment rates. This may present the possibility of different, overlapping, and contradictory structure procedures at the state level.

Section 224 also provides that the Commission shall establish an advisory board composed of the Chairman of the

Federal Power Commission and the Interstate Commerce Commission and at least one representative of State regulatory authorities to assist in the promulgation of rules and minimum standards. Since these persons and their agencies of course would have the opportunity to participate in rulemaking proceedings initiated by the Commission, the establishment of a formal advisory board may be unnecessary. Further, Establishment of such a board might seriously complicate the process of developing rulemaking proceedings, particularly in light of the limited time frame allowed by H.R. 15268.

There also appears to be some question whether the proposed legislation would cover the municipally-owned utility companies in the United States which rough estimates indicate exceed 2,300 in number in number. Section 224(a) (1) defines the term "utility" as follows:

> "Any person whose rates or charges are regulated by a State or the Federal Government and who owns or control poles, ducts, conduits, or rights-of-way uses, in whole or in part, for wire communication. . . ."

The term "person" as defined in section 3(i) of the Communications Act does not mention municipalities although it does include "any corporation joint-stock company, or associate." It is is not clear whether municipally-owned companies could be viewed as "regulated" as that term is used in section 224(a) (1) and thus whether they come under the definition of "utility." Presumably, these questions could be clarified in the reports accompanying the bill.

Finally, we note that while the time frame in which the Commission's comments on this legislation has allowed us to come to only tentative and somewhat speculative conclusions as to possible new manpower needs which will be engendered by the legislation, our initial analysis suggests the possibility that a substantial number of new personnel may be needed-at

least if the Commission is to engage in a Title II regulatory plan which conceivably could require thousands of individual tariff filings. Regardless of the speculative nature of such conclusions, we strongly urge that the Committee consider the possible budgetary impact of enactment of this legislation. In this regard, we further suggest that the Committee might consider the possibility of providing the Commission with the authority and flexibility to provide exemptions from regulations to those small entities who, because of their class or size, it may not be cost effective to regulate.

This letter was adopted by the Commission on September 7, 1976, Commissioner Lee concurring and Commissioner Hooks absent.

By direction of the Commission,

Richard E. WILEY, *Chairman.*

FEDERAL COMMUNICATIONS COMMISSION,

Washington, D.C., September 7, 1976.

Hon. LIONEL VAN DEERLIN,

Chairman, Subcommittee on Communications, Committee on Interstate and Foreign Commerce, House of Representative, Washington, D.C.

DEAR MR. CHAIRMAN: The majority's letter does a creditable job of clinically analyzing some of the substantive and definitional aspects of H.R. 15268. The majority letter, however, comments on the questions of the advisability or necessity of legislation of this bent.

Because of the problems (*e.g.*, summary disconnection orders, unregulated increases for attachments) with which you and your colleagues have become familiar during the present

round of hearings, it is clear that pole attachment charges must be subject to oversight so as not to unfairly burden either the telephone or cable TV rate payers.

It is my view that the FCC presently has jurisdiction over telephone company pole rates under Title II of the Communications Act, and specifically § 202(a):

> "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

The law has made it clear that cable is an interstate service and any charges for an interstate communication service over common carrier facilities is within the FCC province.

At the present time, I do not believe that the Communications Act provides authority for the regulation of rates charged by other utilities.

H.R. 13268 would clarify and remedy the present situation. The federal-deferring-to-state (and local) mechanism for establishing due process standards and providing a forum for rate adjudications is well conceived.

There should be no reasonable objection to legislation of this purpose and I support the concept without reservation. The charges for pole attachments should represent only a proper share of installation, maintenance, depreciation and other legitimate expenses. It is understood that the Commission will require the personnel and resources to

administer this legislation and I am certain that the Congress will be sensitive to the practical consequences thereof.

Thank you for the opportunity to comment on this matter.

Sincerely,

BENJAMIN L. HOOKS, *Commissioner.*

Office Of Telecommunications Policy,

Executive Office Of Tile President,

Washington, D.C., September 3, 1976.

Hon. Lionel Van Deerlin,

Chairman, Subcommittee on Communications, Communications on Interstate and Foreign Commerce, House of Representatives,-Washington, D.C.

DEAR MR. VAN DEERLIN: This is in response to your letter of August 26, 1976, wherein you request the preliminary views of this Office respecting H.R. 15268, a bill to amend the Communications Act of 1934 The bill would lodge primary jurisdiction over the poles, ducts, conduits, or other rights of way used or controlled by a regulated utility, in whole or in part for wire communications, in the Federal Communications Commission. It would require that agency by regulation to: (1) insure just and reasonable rates, terms, and conditions of use by persons desiring to lease such space for wire communications; and (2) provide minimum Federal standards, pursuant to which state regulation of poles and ducts may be enacted.

As a conceptual matter, OTP recognizes that the presence of inherent monopoly structures in utility enterprises may justify and necessitate regulation in order to insure public access to facilities and services at equitable rates. A significant preliminary question is, whether a compelling case are engaging in a pattern of monopoly behavior involving predatory pricing, etc., to such extent that the subject legislation is necessary. While we are aware of particular episodes that appear to support this contention it is not clear to us that the problem has become national in scope. We shall presume to answer this question in the affirmative, however, for the purposes of discussing the legislation.

It must then be asked whether such regulation, long applied to the services provided by public utilities may be applicable as well as to the facilities by which such services are delivered. As a matter of policy, we believe regulation of access to public utility facilities may be justified on the same grounds which warrant regulation of the services rendered by these same facilities. That is, utility services are authorized, and monopoly status typically is conferred, by public law. To serve a greater public good: i.e., a guaranteed service availability, Public rights-of-way are provided for this purpose. It is difficult to see how, from an esthetic, environmental, economic or efficiency stand point, the public would benefit by the proliferation of conduits, poles, and ducts by all parties needing such facilities.

It seems reasonable, therefore to require those in a monopoly position to provide for the shared use of facilities utilizing public rights of way under fair rates, terms and conditions. Thus, we are generally sympathetic to the overall objectives of this legislation.

We have three general concerns with this legislative approach, however. First, we question whether the Federal Communications Commission should be authorized to regulate the poles and ducts of non-communications utilities. Second we question the extent to which the FCC should be authorized to preempt state authority in this area, and third we question whether this bill provides adequate guidance to the Commission to carry out the congressional objectives.

With respect to the first question we are concerned with the efficacy and propriety of delegating jurisdiction over electric companies and other noncommunications utilities to the Commission. The provision of pole line space by power companies appears to us to be a "public service" just as their provision of power is a service. If the FCC is to be accorded jurisdiction over the former, why by the same logic should it not be allowed to regulate the provision of power to cable

companies; or the Federal Power Commission (FPC) allowed to regulate telephone service to power companies for that matter? We do not believe that jurisdiction over a consumer, which the FCC admittedly has with respect to cable and telephone carriers, implies the need for specific jurisdiction over the supplier.

Moreover, we doubt that the Commission has, or could develop in the time periods specified in this legislation, the requisite expertise to determine what reasonable charges are for noncommunications common carrier owned facilities would be. The Commission would be unfamiliar forum to communications carriers, as well, in any Commission rate proceedings. Thus, OTP believes that if it is necessary to regulate the pole attachment practices of power utilities in the public interest in order to facilitate interstate commerce in cable communications, jurisdiction should not be conferred on the FCC.

We note also as a technical matter that this legislation reaches only the poles and ducts used in whole or in part for wire communications and owned by a regulated utility. Excluded from FCC regulation thereby would be the poles and ducts owned by a municipality (for street lighting, for example) or by a utility providing no space on its poles for wire communications. For reasons similar to those expressed above with respect to power utilities, we believe this exclusion to be proper.

With respect to the second question, we recognize that cable's deprivation of pole attachment access on a nationwide basis could adversely affect interstate commerce in cable communications, which would justify Federal intervention. We are concerned, nevertheless, that Federal intervention be limited to that which is demonstrably necessary to assure national interests. Regulation of poles and ducts typically has been a function of state agencies which because of their experience and proximity to the problem can flexibly

particularize regulation to account for problems. conditions, and exigencies unique to a locale. Preemptive and expansive Federal regulation would sacrifice such flexibility, and the need for such regulation must be carefully assessed.

Related to the foregoing is our third concern, that this bill provides inadequate guidance to the Commission governing its regulation of poles and ducts. For example. although the bill authorizes state regulation, it provides almost no statutory standards therefore, but confers blanket authority on the Commission to oversee state regulation. Such a legislative approach appears inconsistent with previous initiatives providing for or encouraging state regulation. (See. for example, Federal Coal Mine, Health, and Safety Act of 1969, Pub. L. 91-173. 30 U.S.C. 801 *et seq*. (1971) Food, Drug and Cosmetic Act, 21 U.S.C. §§ 451-470. (1972). Occupational Safety and Health Act, 29 U.S.C. 655, (1975) and Fair Housing Act, 42 U.S.C. 3602 *et seq*. (1973)).

Of particular concern is the fact that while the bill provides a floor, incremental cost, beyond which state pole rates may not be reduced, there is no comparable statutory standard other than the "just and reasonable" requirement respecting a rate ceiling. We would suggest consideration of a legislative approach which authorized the Commission to establish a range of permissible rates up to a maximum, within which state utility agencies could establish particular rates upon petition and proof by the utility. The Commission could review the maximum rate periodically (every 3 or 5 years for example) in order to account for inflation or other factors. This approach would minimize the need for intrusive Federal regulation and a large FCC staff while preserving state initiative and flexibility. It would be analogous to existing procedures by which utilities seek service rate increases, in that the burden of proof for a pole rate increase would be on the utility who would petition the appropriate State commission. I hopefully such an approach would meet the

cable industry's needs while causing the least amount of disruption to utilities and existing rate procedures.

As another alternative, could not a legislative approach be considered that would authorize Commission review of state policy or regulation respecting pole attachment access without authorizing rate regulation by the Commission itself? The sufficiency of state regulation, and Commission oversight thereof, might be made a condition of cable certification, for example. The Federal interest in facilitating interstate commerce in communications would thus be protected. while the advantages inherent in state regulation would be preserved. Of course, these suggestions, offered as constructive alternatives to H.R. 15268, reflect only a preliminary analysis of the problem in view of your need for an expeditious response.

As a final example of the need for adequate statutory guidelines. We note that the bill's statement of purpose indicates the congressional intent to regulate the "rates, terms, and conditions for the use of communication space on poles, ducts . . .". etc. The operative amendments to Title II however. provide only that the "Commission shall promulgate—(A) regulations which shall assure just and reasonable rates, terms, and conditions for pole attachments." It is unclear, therefore, what authority the Commission has to require the expansion of communications space on a utility pole or duct when it is filled up, or to require access to such pole or duct in the first place when there is no such space allocated.

OTP recognizes the great benefits that cable television can confer on the public through its expanded communications capacity. We support also, as a general matter, the need to insure reasonable access by cable television to the poles and ducts owned and operated by regulated utilities. We question, however, for the reasons stated above, whether this legislation properly disposes of the issue at hand. Additionally, we fear

that premature or precipitous action could create more regulatory problems than would be eliminated by this legislation.

The Office of Management and Budget advises that it has no objection to the submission of this report.

All best wishes.

THOMAS J. HOUSER

ADDITIONAL VIEWS OF HON. TIMOTHY E. WIRTH

As the author of this bill and its predecessor, H.R. 15268, I would like to expand on the Committee's statements in this report explaining Section 1 of this legislation.

H.R. 15372 is intended to provide a forum either at the State or Federal level to regulate the rates, terms, and conditions for pole attachments. It was introduced as a result of the Federal Commission's decision that it lacks authority over pole attachment rates charged by power and electric utilities and the fact that many State regulatory bodies have also disclaimed jurisdiction over the rental of space on poles of telephone and electric utilities.

This legislation requires the Federal Communications Commission to regulate the rates, terms, and conditions for pole attachments. It further provides that the Commission shall promulgate regulations to ensure that such rates, terms, and conditions are just and reasonable. Such regulations, however, shall not take effect until nine months after the date of enactment of this bill.

In the intervening nine-month period or at any time thereafter, the States shall have the opportunity to assert jurisdiction over pole attachments. All State regulatory programs, whether adopted before the enactment of the bill, during the nine month period, or at any time thereafter, must be approved by the FCC. The Commission shall grant

approval if it finds the State regulates pole attachments in a manner designed to provide just and reasonable rates, terms and conditions for pole attachments.

In determining whether the manner of State regulation is designed to provide just and reasonable rates. the Commission must first ask whether the agency or tribunal established by the State is impartial Among the factors the Commission should look at in making its determination is whether such agency or tribunal has been charged with the responsibility of regulating the reasonableness of pole attachment rates, terms and conditions to protect the interests of both the consumers of utility services and the consumers of the wire communications involved in the pole attachments. Accordingly, I would expect the Commission to disapprove a regulatory program where a State says that it has the power to regulate pole attachment rates which are too *low* (to protect consumers of utility services) but not the power to regulate pole attachment rates which are too *high* (to protect consumers of wire communications).

In my view, the Commission must do more, however, than merely find that the agency or tribunal established by the State is impartial and ostensibly affords all parties due process. It must also look to see whether the State agency or tribunal has taken into account all relevant factors involved in the provision of role attachments such as the portion of the poles' total usable space which is occupied by each user, the relative weight of the pole attachments and the legal status each user. Thus, if a State were to adopt regulations whereby the cost of owning and maintaining poles were simply divided equally all users, the FCC could and should find that such State does not regulate pole attachments in a manner designed to provide just reasonable rates," even though such State regulations were adopt in a proceeding affording due process to all parties.

In reviewing a state regulatory program though, the Commission may not specify rates, terms or conditions. However, since the mark for both the FCC and the States is the regulation of pole attachment rates on a "just and reasonable" basis, I would expect the States' regulatory programs generally to be consistent with the Commission's approach.

TIMOTHY E. WIRTH.

ADDENDUM C

UTILITY POLE ATTACHMENTS

OCTOBER 25, 1977.—Ordered to be printed

MR. STAGGERS, from the Committee on Interstate and Foreign Commerce, submitted the following

SUPPLEMENTAL REPORT

[Including cost estimate of the Congressional Budget Office]

[To accompany H.R. 7442]

This supplemental report replaces the following sections in order to include additional material and make technical changes: Purpose and summary of the bill, background and need for legislation, Federal Communications Commission action,. committee action, committee amendments, Senate action, section-by-section analysis, oversight findings, inflationary impact statement, and cost estimate.

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H.R. 7442) to amend the Communications Act of 1934 to provide for the regulation of utility pole attachments. Having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments (stated in terms of the page and line numbers of the introduced bill) are as follows:

Page 2, after line 5, insert the following:

> (2) The term "State authority" means the government of any State, any political subdivision, agency, or instrumentality of a State, and any public utility district or other similar special purpose district established under State law.

Page 2, line 6, strike out "(2)" and insert in Lieu thereof "(3)".

Page 2, line 9, strike out "(3)" and insert in lieu thereof "(4)".

Page 2, line 13, strike out "(4)" and insert in lieu thereof "(5)".

Page 2, line 19, after "authority." insert the following:

Any such State authority may act at any time to regulate such rates, terms, and conditions. Any such regulations prescribed by the Commission or by any State authority shall assure that rates for pole attachments are just and reasonable.

Page 3, after line 4, insert the following:

SEC. 2. Upon the expiration of the 5-year period that begins on the date of the enactment of this Act—

(1) section 224(a) (4) of the Communications Act of 1934, as added by the first section of this Act, is repealed:

(2) section 224(b) (2) of such Act, as added by the first section of this Act, is repealed ; and

(3) section 224(b)(1) of such Act, as added by the first section of this Act, is redesignated as section 224(b).

PURPOSE AND SUMMARY OF THE BILL

The bill (H.R. 7442, as amended) would amend the Communications Act of 1934 to provide for the regulation of utility pole attachments.

The bill has three major provisions:

First, it gives the Federal Communications Commission the authority to regulate the rates, terms, and conditions of pole attachments in any case where such

rates, terms, and conditions are not regulated by any State authority;

Second, the legislation provides that regulations prescribed by the Federal Communications Commission or by any State authority shall assure that the rates for pole attachments are just and reasonable. A just and reasonable rate, whether prescribed by the Commission or by any State authority, is defined as follows. The lower limit of such a rate shall assure the utility the recovery of not less than the additional costs of providing the pole attachment. The upper limit of such a rate shall assure the utility the recovery of not more than the actual capital and operating expenses of the utility attributable to that portion of the pole, duct or conduit used by the pole attachment. Such portion shall be the percentage of the total usable space on a pole, defined as the space on a utility pole above the minimum grade level which can be used for the attachment of wires and cables, or the total capacity of the duct or conduit, that is occupied by the pole attachment;

Third, the definition of a just and reasonable rate, otherwise known as the "zone of reasonableness," is repealed 5 years from the date of enactment of the bill.

BACKGROUND AND NEED FOR LEGISLATION

The cable television industry brings broadcast signals and other entertainment and information to its subscribers by attaching its wire to existing utility company poles (for purposes of this report. the word "poles" also refers to ducts or conduits). These poles are usually owned by telephone companies and electric utilities which often enter into joint use or joint ownership agreements for the use of each other's poles. These agreements commonly reserve a portion of each pole for the use of communication services. Regardless of who owns the pole, telephone companies usually control the

connection space set aside for communication services. It is a part of this portion that is leased to a cable system for the attachment of its wire. Use is made of existing poles rather than newly placed poles due to the reluctance of most communities, based on environmental considerations, to allow an additional, duplicate set of poles to be placed. Therefore, some form of accommodation must be reached by owners of poles and those wishing to have access to existing poles.

This bill (H.R. 7442, as amended) is designed to remedy a situation which was first brought to the attention of the Subcommittee on Communications last year. During the 2d session of the 94th Congress, the Subcommittee on Communications held 15 days of cable television oversight hearings during which the issue of pole attachments was discussed. On Wednesday, July 28, 1976, the subcommittee heard testimony from Hon. Charles Rose, Democrate of North Carolina, who had introduced House Resolution 1361, which sought to encourage the Federal Communications Commission (FCC) to assert jurisdiction over pole attachments. Mr. Rose had been moved to introduce such a resolution following a pole attachment dispute in two towns in his district (Whiteville and Chadbourne in Columbus County) and in two towns contiguous to his district (Dunn and Erwin in Harnett County), which caused approximately 1,200 cable television subscribers to lose cable television service. The dispute also threatened to disrupt service of 2,000 additional subscribers in Fayetteville, N.C. The subcommittee also heard testimony from representatives of the cable television industry and from telephone and electric companies. Cable industry representatives testified that they are totally dependent on telephone and power company poles for the purposes of building and extending their systems and that such utilities, by virtue of their monopoly ownership of poles, are in a position to force cable television companies seeking to attach their wire to utility poles into virtual

contracts of adhension. Such contracts, it was asserted, leave no room for negotiation and are offered to cable television companies on a take-it-or-leave-it basis. In addition, the subcommittee heard that once cable television companies are permitted to attach their wire to utility poles, the ratc charged for such attachments can be adjusted upward without any justification offered by the utility and without any opportunity for negotiation with the utility. Cable television industry representatives testified further that the pole attachent controversy exists, in part, because telephone companies consider the cable industry to be a potential competitor, and pole disputes are the result of anticompetitive conduct. Finally, they states that accurate estimates of the cost of the pole attachment to the utility cannot be computed unless and until utility companies are willing to disclose capital investment and depreciation costs.

Testimony received from utility company representatives foused report on two major points, raising the jurisdictional question about whether the FCC had the authority to regulate the rates charged by telephone which and electric power companies for the communication space on their poles and the policy question about whether the FCC or a State authority should regulate these rates. Such witnesses stated that pole rental charges should be based on a formula that correctly assigns usage to each attachment and that the avenge price charged cable companies for their attachment does not approximate, or even come close to, what it would cost cable television systems to erect their own pole plant.

On August 25, 1976, Mr. Wirth, Democrat of Colorado, along with Chairman Van Deerlin, Democrat of California, and Mr. Rose, introduced H.R. 15268, a bill granting the FCC the authority to regulate the rates, terms and conditions for the use of communication space on utility poles. The bill also gave the States the authority to so regulate provided that certain federally established minimum standards were met.

On August 31, 1976, Chairman Van Deerlin, along with Mr. Wirth, Mr. Waxman, Democrat of California, Mr. Brown of Ohio, Mr. Florio, Democrat of New Jersey, and Mr. Rose introduced H.R. 15372, identical to H.R. 15268 except for the addition of a section giving the FCC the right to extend its authority to levy penalties and forfeitures for the willful or repeated violation of FCC rules and regulations.

The Subcommittee on Communications held 1 day of hearings on H.R. 15268 and H.R. 15372 on September 1, 1916. The arguments presented in support of and in opposition to the pole attachment sections of the legislation were similar to those heard on July 28, 1976, at the earlier hearing.

The subcommittee met in open markup session on September 8, 1976, to consider H.R. 15372 and reported the bill, with amendments, to the full Committee on Interstate and Foreign Commerce.

H.R. 15372 was ordered reported to the House by the full committee on September 16, 1976, by a voice vote. Due to controversy surrounding section 2 of the bill, extending the authority of the FCC to levy penalties and foreitures for the willful or repeated violation of its rules and regulations, H.R. 15372 never reached the floor of the House for a vote.

During subsequent months further negotiations on the pole attachment issue were held by interested parties. On March 7, 1977, representatives of the National Cable Television Association (NCTA), which represents a large segment of the cable television industry, and the National Association of Regulatory Utility Commissioners (NARUC), which represents the State regulators, presented Chairman Van Deerlin with a copy of a draft pole attachment bill jointly agreed to by both parties. On March 10, 1971, the draft legislation was circulated to a number of interested parties for comment. On May 6, 1977, Mr. Wirth and Mr. Broyhill, Republican of

North Carolina, circulated a "Dear Colleague" letter inviting members to join them in cosponsoring the draft NCTA/NARUC legislation. On May 25, 1977, Mr. Wirth, Mr. Broyhill, and 15 cosponsors introduced H.R. 7442 in the House. Subsequently, duplicate bills, H.R. 8075, H.R. 8675, and H.R. 8564 were introduced with additional cosponsors.

On July 22, 1977, the Subcommittee on Communications held 1 day of hearings on the subject of cable television pole attachments to bring the record up to date. A panel consisting of cable television industry, utility company, FCC and NARUC representatives considered the following questions:

1. Are there barriers to reaching mutually acceptable pole attachment agreements that require the intervention of a third party?

2. If a forum is necessary for the resolution of pole attachment disputes, in which jurisdiction should such authority be vested?

3. What method of allocating pole attachment costs among users would be fair and reasonable?

Representatives of the cable television industry testified that from heir standpoint the situation had deteriorated since the subcommittee had last considered the problem, and that a legislative solution was still the favored method of resolving continuing differences. Such representatives stated that the cable industry still has a near total dependence on utility poles for delivering service to subscribers and that this dependence was having an adverse economic impact on their industry.

The industry attaches to approximately 10 million utility poles at an average rate of $3.50 per pole per year. As of July 1977, there were 27 states in which pole attachment disputes existed. Seven independent telephone companies announced an average rate increase of 67 percent for pole attachments, from an average of $4 per pole to an average of $6.67 per pole. In addition, one independent telephone company

canceled all pole contracts, affecting in excess of 150,000 poles. Thirty-three electric utility companies also announced rate increases. The overall 55 percent increase adjusted the rates from an average of $3.90 per pole to an average of $6.05 per pole. For the 41 companies discussed above, the combined overall rate increase was 61 percent. The impacted areas in these 27 States contain approximately 25.4 million television households, 35 percent of all the TV households in the United States. Cable television households in the impacted areas total 4.3 million, or 39 percent of all the cable house-holds in the United States. Finally, the pole attachment agreement between NCTA and the American Telephone and Telegraph Co. (A.T. & T.) is due to expire on December 31, 1978, and the cable industry indicated its concern about the potential effect of such expiration. Their prediction was that the number of pole attachment disputes would dramatically increase upon the expiration of the agreement due to the fact that Bell System companies provide 85 percent of the telephone service in the United States and cover a corresponding large area of cable television service. The contrast was also made that 11 months prior to the July 22, 1977, hearing, only 23 utility companies in 16 States were involved in pole disputes with cable systems. In April 1977, cable systems were involved in disputes with 32 utilities in 20 States and as of July 1977, those numbers had risen to 41 utilities in 27 States.

The telephone and electric company representatives testified that the pole problems that exist between them and the cable television industry are not sufficiently significant to warrant a legislative solution, particularly one which vests authority for such regulation in a Federal agency. If there is to be any regulation of pole attachments, they contended, it ought to be at the State level through public service or public utility commissions. The utility representatives stated that such commissions have a high degree of expertise with respect to the operation and maintenance of utility

distribution poles and are more sensitive to local problems than a Federal agency would be. Utility representatives testified further, that pole disputes center on one major issue and that is that the cable industry believes that it should pay a rental fee that is equal to the incremental cost to the utility for the pole attachment and the utilities believe that they should receive from the cable company a rental fee that is equal to the value of the space a that is rented. Such a range is admittedly wide, but the utilities believe that the interested parties can negotiate a rate acceptable to all parties, or failing that, can seek a resolution on the State level.

A representative of the FCC testified that on the basis of Commission research, there have been relatively few formal pole attachment disputes which have resulted in actual litigation, but that the testimony of the cable television industry constituted a fair representation of the potential problem. Such an assessment, it was stated, was based on the appearance of unequal bargaining power on the part of cable television companies and utility companies. The FCC witness testified further that the Commission believes that if the creation of a regulatory forum is necessary for the resolution of pole attachment disputes, such a forum would be most appropriately lodged with the States. The Commission based its position on the belief that the resolution of such matters involves the need for expertise with respect to not only telephone company regulation but also power company regulation. The FCC representative testified that the Commission does not have such expertise and if one adds the necessity to understand local problems, it would be preferable, according to the Commission, to decentralize such regulation rather than centralize it within a Federal agency. Finally, the FCC believes that Federal regulation of pole attachments would place an undue administrative and economic burden on the Commission.

FEDERAL COMMUNICATIONS COMMISSION ACTION

The Federal Communications Commission has had pending since 1966 the question of the nature and the extent of its jurisdiction over pole attachments. In 1973, the Commission terminated the evidentiary phase of its inquiry and invited comment on, and designated for oral argument, the issue of the nature and extent of the Commission's jurisdiction over the policies and practices of pole rental charges to cable companies by telephone common carriers and other utilities.

On September 29, 1975, the National Cable Television Association and American Telephone and Telegraph Co. entered into an agreement with respect to pole attachment rates charged to cable companies. To aid interested parties who did not participate in the agreement and who were negotiating or renegotiating pole attachment agreements, the Commission released a formula, devised by its staff, to be used in determining reasonable pole attachment rates.

On July 8, 1976, the Commission decided that it did not have jurisdiction over poles owned by power companies and deferred a decision regarding telephone company-owned poles pending further staff study of the "jurisdictional and economic issues."

On March 18, 1977, the FCC issued a Memorandum Opinion and Order in which it affirmed its July 8, 1976 decision regarding jurisdiction over power company-owned poles, and stated that it saw no reason to separate the resolution of policy and legal issues of jurisdiction on the basis of whether the party owning poles is a telephone company or a nontelephone company.

STATE REGULATION OF POLE ATTACHMENTS

On September 21, 1977, Governor Edmund Brown signed into law S.B. 177, a bill to regulate pole attachments. The

California bill, which becomes effective January 2, 1978, represents the first such action by a State legislative body and enacts into law regulation of utility poles which includes standards for the regulatory body. Such standards, which include a zone within which rates may be set, are the same as those contained in H.R. 7442. The California pole attachment bill, however, does not include a sunset provision.

Connecticut and Hawaii also regulate utility pole attachments pursuant to their general utility regulation of cable television.

According to a March 1977 report issued by the Cable Television Bureau of the Federal Communications Commission, "Cable Television Pole Attachment State Law and Court Cases," no other States exercise rate regulation for cable television pole attachments.

COMMITTEE ACTION

The committee, acting through its Subcommittee on Communications, held one day of hearings on the need for pole attachment legislation on July 22, 1977. In the course of these hearings testimony was taken from representatives of the cable television industry, telephone the companies, power companies, the Federal Communications Commission and State regulators. In addition, written comments were received from approximately 40 interested parties.

The Subcommittee on Communications met in open markup session on October12, 1977, to consider H.R. 7442 and reported the bill, with amendments, by a unanimous vote to the full committee.

H.R. 7442 was ordered reported to the House by the committee on October 18, 1977, by a unanimous voice vote while a majority of the committee was present.

COMMITTEE AMENDMENTS

The committee amendments to the text of H.R. 7442 are printed in italic in the reported bill.

SENATE ACTION

The Senate Committee on Commerce, Science, and Transportation reported S. 1547 from committee to the Senate on October 11, 1977. No report is presently available. S. 1547 deals with pole attachments but also deals with penalties and forfeitures assessed for violation of FCC rules and regulations. Your committee has held no hearings on penalties and forfeitures in this Congress, and therefore, H.R. 7442 contains no such language.

SECTION-BY-SECTION ANALYSIS

The bill amends title II of the Communications Act of 1934 by adding a new section 224.

Section 1(a) of the bill defines—

(1) "Utility" as any person who provides telephone service or electric energy to the public and who owns or controls poles, ducts, conduits, or right-of-way used, in whole or in part, wire communication. Such term does not include any corporation or other similar entity owned by the Federal Government;

(2) "State authority" as the government of any State, a political subdivision, agency, or instrumentality of a State, and any public utility district or other similar special purpose district established under State law;

(3) "Federal Government" as the Government of the United States or any agency or instrumentality thereof;

(4) "Pole attachment" as any attachment for wire communication on a pole, duct, conduit or other right-of-war owned or controlled by a utility; and

(5) "Usable space" as the space on a utility pole above the minimum grade level which can be used for the attachment of wires and cables.

Section 1(b) states—

(1) That the FCC shall regulate the rates, terms, and conditions for pole attachments in any case in which such rates, terms, and conditions are not regulated by any State authority. Any such State authority may act at any time to regulate such rates, terms, and conditions. Any such regulations prescribed by the FCC or by any State authority shall assure that rates for pole attachments are just and reasonable; and

(2) That a just and reasonable rate, whether prescribed by the FCC or by any State authority, shall assure the utility the recovery of not less than the additional costs of providing pole attachments nor more than the actual capital and operating expenses of the utility attributable to that portion of the pole, duct, or conduit used by the pole attachment. Such portion shall be the percentage of the total usable space on a pole, or the total capacity of the duct or conduit, that is occupied by the pole attachment.

Five years after enactment, section 2 of the bill—

(1) repeals section 1(a)(4) of the bill which added the "usable space" definition;

(2) repeals section 1(b)(2) of the bill which contained rate guidelines; and

(3) redesignates section 1(b)(1), which gave the FCC authority to regulate rates, as section 1(b).

The committee wants to state its intention that; (1) the FCC establish a complaint procedure for the purpose of enforcing this legislation, rather than act on its own initiative to seek out and resolve pole attachment disputes; (2) the maximum

lawful pole attachment rate be computed by multiplying the percentage of the usable space on a Pole occupied by the cable television pole attachment times the total actual capital and operating expenses of the pole for the period covered by the rate; and, (3) nothing in this legislation. especially the ratemaking criteria, be construed to apply in any area of Federal or State regulation other than in the regulation of cable television pole attachments.

OVERSIGHT FINDINGS

There are no formal oversight findings by the committee pursuant to clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives.

No oversight findings have been submitted to the committee by the Committee on Government Operations pursuant to clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(1)(4) of rule XI of the Rules of the House of Representatives, the committee makes the following statement regarding the inflationary impact of the reported bill:

> The committee is unaware that any inflationary impact on the economy will result from the passage of HR. 7442.

COST ESTIMATE

Pursuant to clause 7 of rule XIII of the Rules of the House of Representatives, the committee estimates that there will be some costs involved in carrying out this bill in each of the 5 fiscal years following the enactment of this bill. The committee was unable to determine the exact amount of these projected costs with the information available to it.

In regard to clause 2(1)(3)(C) of rule XI of the Rules of the House of Representatives, the committee includes the following cost estimates submitted by the Congressional Budget Office relative to the provisions of H.R. 7442.

CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

OCTOBER 19, 1977.

1. Bill number: H.R. 7442.

2. Bill title: Communications Act Amendment of 1977.

3. Bill status: As ordered reported by the House Committee on Interstate and Foreign Commerce, October 18, 1977.

4. Bill purpose: This bill provides for the regulation, by the Federal Communications Commission (FCC), of rates, terms and conditions for attachments to utility poles, conduits, or other rights-of-way for wire communication owned by utilities. The FCC is to perform such regulation only in the absence of State regulation.

5. Cost estimate:

[In thousands of dollars]

Fiscal year:	Estimated costs
1978	137
1979	441
1980	470
1981	500
1982	532

The costs of this bill fall within budget function 400.

6. Basis of estimate: This bill increases the regulatorv responsibilities of the FCC, thus increasing its manpower requirements. It is assumed, however, that some of the regulatory functions will be performed by the various States.

It is estimated that the FCC will need to hire 20 additional lawyers, economists and clerks to first develop attachment regulations and then process complaints.

For the purpose of this estimate, it is assumed that this bill will be enacted on or about April 1, 1978. On this basis, these personnel requirements will result in an estimated cost of $137,000 during the latter part of fiscal year 1978, increasing to $441,000 when fully implemented in fiscal year 1979. Costs in the following years reflect inflation and shifts in manpower resources as actual processing of complaints begins.

7. Estimate comparison: None.

8. Previous CBO estimate: On October 17, 1977, CBO prepared a cost estimate for S. 1547, the corresponding Senate bill ordered reported by the Senate Committee on Commerce, Science, and Transportation. S. 1547 is estimated to result in somewhat higher costs, due to the additional requirements regarding forfeiture regulation.

9. Estimate prepared by: Mark Berkman:

10. Estimate approved by:

C. G. NUCKOLS
(For James L. Blum),
Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows new matter is printed in italic, existing law in which no change is proposed is shown in roman):

COMMUNICATIONS ACT OF 1934

* * * *

TITLE II—COMMON CARRIERS

* * * *

UTILITY POLE ATTACHMENTS

SEC. 224 (a) *As used in this section:*

(1) The term "utility" means any person who provides telephone service or electric energy to the public and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communication. Such term does not include any corporation or other similar entity owned by the Federal Government.

(2) The term "State authority" means the government of any State, any political subdivision, agency, or instrumentality of a State, and any public utility district or other similar special purpose district established under State law.

(3) The term "Federal Government" means the Government of the United States or any agency or instrumentality thereof. .

(4) The term "pole attachment" means any attachmentt for wire communication on a pole, duct, conduit, or other right-of-way owned or controlled by a utility.

(5) The term "usable space" means the space on a utility pole above the minimum grade level which can be used for the attachment of wires and cables.

(b)(1) The Commission shall regulate the rates, terms, and conditions for pole attachments in any case in which such rates, term, and conditions are not regulated by any State authority may act at any time to regulate such

rates, terms, and conditions. Any such regulations prescribed by the Commission or by any State authority shall assure that rates for pole attachments are just and reasonable.

(2) A just and reasonable rate, whether prescribed by the Commission or by State authority, shall assure the utility the recovery of not less than the additional costs of providing pole attachments nor more than the actual capital and operating expenses of the utility attributable to that portion of the pole, duct, or conduit used by the pole attachment. Such portion shall be the percentage of the total usable space on a pole, or the total capacity of the duct or conduit, that is occupied by the pole attachment.

* * * *

ADMINISTRATION COMMENTS

OFFICE OF TELECOMMUNICATIONS POLICY,
EXECUTIVE OFFICE OF THE PRESIDENT,
Washington, D.C., May 2, 1977.

Hon. LIONEL VAN DEERLIN,

Chairman, Subcommittee on Communications, Committee on Interstate and Foreign Commerce, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your letter of March 10, 1977, in which you have requested the comments of this office with respect to the proposed pole attachment legislation agreed to by the National Association of Regulatory Utility Commissioners (NARUC).

The proposed Bill establishes Federal Communications Commission (FCC) Jurisdiction to regulate the rates, terms, and conditions for pole attachments for wire communication if the pole, duct, conduit, or right-of-way is used in whole or in part for wire communications, is owned or controlled by

any person who provides telephone service or electric energy to the public, and the rates, terms, and conditions are not regulated by any State authority.

It requires either the Commission or the State authority, as the case may be, to assure that only just and reasonable rates are charged for pole attachments. A just and reasonable rate must assure the utility the recovery of not less than the additional costs of providing pole attachments nor more than the actual capital and operating expenses attributable to that portion of the pole used by the pole attachment. This latter portion would be the percentage of the total usable space on the pole used by the pole attachment.

In September of last year, the subcommittee considered a similar but more restrictive bill, HR. 15268. That bill placed primary jurisdiction over poles and ducts in the FCC and authorized the Commission to establish minimum standards to be met by State regulatory authorities choosing to regulate pole attachment arrangements.

OTP expresses no view on whether a compelling case has been made justifying pole attachment legislation as necessary to assure CATV access at reasonable rates to utility facilities and services. We believe, as a general principle, monopoly utility facilities should be available to serve the general public good. This principle certainly extends to public rights-of-way used by those utilities. We view this legislation as consistent with that principle.

We do not believe the FCC should be delegated general jurisdiction over the facilities of electric companies and other noncommunications utilities. Jurisdiction over cable television companies and telephone companies does not necessarily imply the FCC needs or has the expertise required for specific jurisdiction over all suppliers of pole and conduit space, including electric utility companies. However under the proposed bill, FCC jurisdiction would not exist if the state

regulatory authorities adopt any plan to regulate pole and conduit space. This accommodates our concerns. In this regard, we are advised that the NARUC has prepared model legislation for states to adopt if they so choose.

The NCTA/NARUC bill provides incremental costs as a rate floor and the actual capital and operating expenses of the utility attributable to that portion of the pole, duct, or conduit used by the pole attachment as a rate ceiling for pole attachment charges. Assuming that actual capital expenses include a reasonable return on capital based upon a regulated industry standard determined in a proceeding consistent with the principles of the Administrative Procedure Act, we believe this is an adequate rate standard. The burden of proof for pole rate increase should be on the utility which has control of the right-of-way when it chooses to set or increase pole attachment rates. We suggest that clarifying language be added to the bill to place the burden of proof on whichever party seeks to change the applicable pole attachment rates.

We believe the pole attachment formula developed by the FCC staff in November of 1975 is a reasonable approach to the pole attachment rate problem and that the legislative history of this proposed bill should make clear that the FCC proposal is fully consistent with the standards in the legislation.

The proposed bill does not contain a clear statement of intent by the Congress to circumscribe the rate setting authority of State authorities which do exercise pole attachment jurisdiction. The "just and reasonable" standard should be made clearly applicable to states. We suggest that a new sentence be inserted following the first sentence in section 224(b) as follows: "No rate, whether prescribed by the Commission or a State authority, shall be other than just and reasonable as herein defined." The next sentence should be modified to eliminate duplicative wording.

This proposed legislation addresses itself only to rate regulation, but its statement of purpose indicates an intent to allow FCC regulation of "rates, terms, and conditions for the use of communications space on poles, ducts . . . ," et cetera. It is unclear, therefore, what authority the Commission has to require access to pole rights-of-way in the first instance or the expansion of communications space on existing utility poles or ducts or, generally, to exercise jurisdiction over problems which might arise in relations between the parties to pole attachment arrangements. This authority should be clarified.

In conclusion, this bill addresses a number of issues relevant to the overall regulation of both mass media and common carriers under the Communications Act of 1934. For example, the bill establishes standards for the appropriate Federal/State regulatory roles, principles of cost allocation and cost accounting for rate regulations of different communications services and principles of access at reasonable rates to common carrier facilities by potential service competitors. Passage of this bill will establish precedents for these issues which may prove controlling in different communications policy contexts. We believe any principles expressed in this bill should be carefully reviewed to ensure they are consistent with the overall direction of national communications policy.

The Office of Management and Budget advises that it has no objection to the submission of this report.

Sincerely,

WILLIAM J. THALER, *Acting*.

ADDENDUM D

By Mr. HOLLINGS:

S. 1547. A bill to amend the Communications Act of 1934, as amended, with respect to penalties and forfeitures, and to authorize the Federal Communications Commission to regulate pole attachments, and for other purposes; to the Committee on Commerce, Science, and Transportation.

Mr. HOLLINGS. Mr. President, I introduce a bill (S. 1547) to amend the Communications Act of 1934 in two respects. First, this bill addresses problems attendant to the use of utility poles, ducts, conduits, or rights-of-way by cable television systems. The question of cable's access to utility poles owned or controlled by electric power or telephone utilities, as well as the reasonableness of the rates charged for such access, has become a matter of significant practical concern to the cable television industry, a matter which impinges upon the ability of cable television to serve its viewing public.

The second part of this bill unifies and strengthens those provisions of the Communications Act dealing with the imposition of forfeitures or civil penalties by the Federal Communications Commission for violation of the act and Commission rules and regulations.

The Commission's forfeiture authority would be enlarged in scope to cover persons not now under forfeiture provisions.

I believe that it is imperative for Congress to act in these two areas now, without awaiting a more thorough review of the basic statute governing the entire national communications structure. Furthermore, I think it appropriate to consider these two provisions in tandem as they both involve Federal regulatory intervention in areas where the need for prompt, effective action is becoming increasingly apparent.

The pole attachment provision which I introduce today is the outgrowth of an agreement on draft legislation reached by representatives of two of the affected parties, namely the National Cable Television Association and the National Association of Regulatory Utility Commissioners. I understand that other interested parties have not participated directly in these negotiations.

The bill establishes Federal Communications Commission jurisdiction to regulate the rates, terms, and conditions for pole attachments for wire communication if the pole, duct, conduit, or right-of-way is used in whole or in part for wire communications, and is owned or controlled by any person who provides telephone service or electric energy to the public. Such Federal jurisdiction would not be exercised in any case where a State authority regulates those rates, terms, and conditions. The bill requires the Commission or the State authority, as the case may be, to assure that only "just and reasonable" rates are charged for pole attachments, and sets forth certain parameters to this standard.

My purpose in introducing this pole attachment measure at this time is to provide a framework for further discussion and consideration of a very complex matter which raises broad legal and economic issues of utility regulation and communications policy extending beyond the immediate practical problems faced by cable television operators.

Indeed, this proposal is only a modest first step, and implicitly raises many questions which may require additional statutory refinement. For example, we should examine the appropriateness of delegating to the FCC jurisdiction over nontelephone company practices not heretofore within the ambit of that agency's authority. Moreover, we should consider whether pole attachment and conduit space agreements constitute "communication by wire or radio" within the meaning of that phrase under the Communications Act. Perhaps, after further deliberation, it will be shown that

pole attachment legislation should more clearly circumscribe the rate-setting authority of State regulatory bodies which exercise pole attachment jurisdiction.

Finally, while this draft proposal speaks in terms of regulating the "rates, terms, and conditions for the use of communications space in poles . . ." the proposal addresses itself only to rate regulation. The draft offers no specific mandate to the Commission to require access to poles in the first instance, or the expansion of cable communications use on existing or newly available poles. I hope that all of these considerations and others will be explored in the near future in committee hearings, at which time all interested parties will have an opportunity to present their views and perhaps to suggest alternative legislative approaches which might better accommodate the concerns to which I have briefly alluded.

Nevertheless, the proposal which I offer today is a constructive first step in recognition of a Federal interest in assuring that all those providing communications services are able to use existing communications space on poles which are owned or controlled by regulated utilities. Of ultimate concern, however, will be the effect that any legislation in this area will have on the interests of the consumer, and by "consumer" I mean not only the cable television subscriber, but the consumer of electric power, telephone and other public services.

The forfeitures section of this bill is identical to S. 2343, which was passed by the Senate last June.

The Federal Communications Commission testified last year to the Commerce Committee that its existing forfeiture authority is inadequate effectively to enforce the Communications Act of 1934. The limitations period within which a notice of apparent liability must be issued is unrealistic in light of the necessary preliminary field investigations required. The maximum amount of forfeitures permitted for

single and multiple offenses are unrealistically low to form an effective deterrent or to provide sufficient penalty to warrant the attention of Federal prosecuting authorities.

This bill would enlarge the scope of forfeiture liability to cover all persons subject to the Communications Act—such as cable television systems, users of experimental or medical radio equipment, persons operating without a valid radio station or operator's license, and some communications equipment manufacturers. This expanded enforcement authority will be especially important since the number of cable systems can be expected to increase in the coming years, and, of course, the number of licensees, as well as persons operating without required authorizations, in the citizens band radio service, has increased dramatically in the recent past.

Additional alterations in the existing forfeiture revisions would be accomplished by extending the limitations period within which the Commission must act, granting a greater degree of procedural flexibility, and by raising the maximum forfeiture that could be imposed for single and multiple offenses.

Significantly the FCC would be required to provide a personal interview and a "second clearance" before levying a fine on all persons subject to FCC regulations who logically would be expected to be unfamiliar with the FCC's rules and regulations. Moreover, with respect to cable television in particular, it should be remembered that the purpose of this bill, as with its predecessor bill last session is not to create general forfeiture liability for that industry, but to treat all parties subject to the Communications Act equitably. Consistent with past practice, the FCC, I trust, is unlikely to use its new authority over cable to harass small operators for insignificant and isolated technical violations which have insignificant impact on broadcasters or cable subscribers.

However, as the Commerce Committee stated in its report on S. 2343, this bill predecessor, persons wishing to use the Nation's scarce electromagnetic energy spectrum for their own commercial or personal benefit must accept the responsibilities commensurate with that privilege.

ADDENDUM E

SEC. 704. FACILITIES SITING; RADIO FREQUENCY EMISSION STANDARDS.

(a) NATIONAL WIRELESS TELECOMMUNICATIONS SITING POLICY-Section 332(c) (47 U.S.C. 332(c)) is amended by adding at the end the following new paragraph:

(7) PRESERVATION OF LOCAL ZONING AUTHORITY-

(A) GENERAL AUTHORITY- Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) LIMITATIONS—

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) DEFINITIONS—For purposes of this paragraph—

(i) the term 'personal wireless services' means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term 'personal wireless service facilities' means facilities for the provision of personal wireless services; and

(iii) the term 'unlicensed wireless service' means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v)).'.

(b) RADIO FREQUENCY EMISSIONS—Within 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions.

(c) AVAILABILITY OF PROPERTY—Within 180 days of the enactment of this Act, the President or his designee shall prescribe procedures by which Federal departments and agencies may make available on a fair, reasonable, and nondiscriminatory basis, property, rights-of-way, and easements under their control for the placement of new telecommunications services that are dependent, in whole or in part, upon the utilization of Federal spectrum rights for the transmission or reception of such services. These procedures may establish a presumption that requests for the use of property, rights-of-way, and easements by duly authorized providers should be granted absent unavoidable direct conflict with the department or agency's mission, or the current or planned use of the property, rights-of-way, and easements in question. Reasonable fees may be charged to providers of such telecommunications services for use of property, rights-of-way, and easements. The Commission shall provide technical support to States to encourage them to make property, rights-of-way, and easements under their jurisdiction available for such purposes.

JUN 5 2001

Supreme Court, U.S.
FILED
JUN 5 2001
CLERK

No. 00-832, 00-843

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

GULF POWER COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENTS ATLANTIC CITY ELECTRIC COMPANY, DELMARVA POWER & LIGHT COMPANY, POTOMAC ELECTRIC POWER COMPANY, PUBLIC SERVICE ELECTRIC & GAS COMPANY, TAMPA ELECTRIC COMPANY, VIRGINIA ELECTRIC & POWER COMPANY, AND UNION ELECTRIC COMPANY, D/B/A AMERENUE

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Pole Attachments Act, 47 U.S.C. § 224, grants the Federal Communications Commission jurisdiction to regulate rates for pole attachments by cable multimedia companies that are simultaneously used to provide high-speed Internet access service and conventional cable service.

2. Whether the Pole Attachments Act applies to attachments of wireless telecommunications equipment.

RULE 29.6 STATEMENT

All Respondents on behalf of whom this brief is filed submitted a Rule 29.6 statement in the joint Brief in Opposition to the Petitions for Writ of *Certiorari*, except Union Electric Company d/b/a Amerenue, which is a wholly-owned subsidiary of Ameren Corporation, a publicly held company.

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COUNTERSTATEMENT OF THE CASE

A. The 1978 Pole Attachments Act.

The cable television ("CATV") industry began simply as a means of providing better reception for television programming received by antennae. *See* Brief of Petitioner National Cable Television Association at 4 ("NCTA Brief"). To accomplish its mission, the CATV industry needed to run coaxial cable to residences, and the most efficient way to do this was to string its cables on utility poles owned by electric utilities and telephone companies. Although the CATV industry sought assistance from the Federal Communications Commission ("FCC" or "Commission") regarding claimed monopoly pricing activities by electric utilities, in 1977 the FCC concluded it had no jurisdiction over electric utilities. *In re California Water and Telephone Co.*, 64 F.C.C. 2d 753, 758-59 (1977).

Congress responded in 1978 by enacting the Pole Attachments Act, 47 U.S.C. § 224 (the "Pole Attachments Act" or the "Act"), one of many legislative initiatives to facilitate the growth of the CATV industry.[1] Included as part of the Federal Communications Act of 1934, 47 U.S.C. § 151 *et seq.* (the "Communications Act"), the Act granted the FCC narrow authority over the "communications space" on the poles of electric utilities—solely to the extent the utility had already voluntarily provided a CATV company access to the "communications space"—to regulate the rates, terms, and conditions for pole attachments by CATV companies. *Florida Power Co. v. FCC*, 480 U.S. 245 (1987); *In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 68 F.C.C. 2d 1585 (1978); S. Rep. No. 95-580, at 15 (1978), *reprinted in* 1978 U.S.C.C.A.N. 109, 123. In specific terms, the Act granted the FCC authority to regulate "any attachment by a cable

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[1] A copy of the Act as enacted in 1978 is attached at Appendix 1a-4a.

television system," 47 U.S.C. § 224(a)(4) (1978), and provided for one regulated attachment rate. 47 U.S.C. § 224(d)(1) (1978). As a policy measure, the Act coincided with the Commission's approach of relaxing restrictions on the cable industry so as to promote product diversification and growth. *In the Matter of Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television*, 71 F.C.C. 2d 632, 645 (1979). At the time, 3,832 cable system operators were providing 11 million households with video services. *Id.* at 654.

B. The CATV Industry's Metamorphosis Into The Cable Multimedia Industry.

In the 23 years since Congress passed the Act, the nascent CATV industry Congress sought to protect has ceased to exist in any recognizable way. The CATV industry is now the cable multimedia industry, with its members providing not merely traditional cable television service, but also data services, Internet access service, broadband service and cable telephony. *See In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 2001 FCC LEXIS 98, ¶¶ 16-17 (Jan. 8, 2001) ("*Seventh Annual Report on Video Programming*"). Cable multimedia companies are corporate giants, with several NCTA members each having annual revenues in the billions. *Id.* at ¶ 27.

This dramatic transformation from a fledgling single-purpose industry to a diversified corporate powerhouse began in the decade after the 1978 Act, as the cable industry began drawing on a wider range of television program sources rather than simply re-transmitting broadcast television signals. *In the Matter of Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems*, 1 F.C.C.R. 864, 866 (1986) ("Amendment of Part 76"). Rather than remaining a secondary distribution system, CATV became a

powerful impetus for the growth of video services. *Id.* In recognition of this growth, and the CATV industry's potential for continued growth, Congress passed the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984) (codified in various parts at 47 U.S.C.) ("1984 Cable Act"). *See* Amendment of Part 76, 1 F.C.C.R. at 866. The 1984 Cable Act established a national policy to encourage "the growth and development of cable television services." *Id.* The Commission followed suit by easing CATV regulations such as those requiring mandatory signal carriage. *Id.* at 864. At the time, however, Congress did not deem it necessary to make any changes to the Pole Attachments Act, nor did the FCC see fit to alter its implementing regulations.

The explosive growth of the CATV industry continued. Between 1984 and 1989, the cable industry increased its annual revenues from $8.5 billion to $17.7 billion and its subscriber base from 37 million to 53 million. *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television* Service, 66 Rad. Reg. 2d (P&F) 771 (1990). In its 1990 Report to Congress, the Commission concluded that its deregulatory posture had promoted the industry's growth, but that there were signs of anti-competitive behavior. *Id.* Congress responded with the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (codified at 47 U.S.C. §§ 521-555 (1994 & Supp. IV 1998)), affording protection for consumers while simultaneously charging the Commission with increasing competition in the marketplace. Two years later, this Court recognized that, because of technological advancements and the "increasing convergence between cable and other electronic media," the cable industry stood "at the center of an ongoing telecommunications revolution with still undefined potential." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 627 (1994).

Congress then passed the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified in various parts at 47 U.S.C.) ("1996 Telecommunications Act")—including certain amendments to the Pole Attachments Act discussed below—in order to increase competition in the telecommunications marketplace and to facilitate the deployment of advanced services. 47 U.S.C. § 157 (1994); 47 U.S.C. § 230 (Supp. IV 1998). *See also* S. Conf. Rep. No. 104-230, at 1 (1996); *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499 (1996) ("*Local Competition Order*"). In the wake of the 1996 Telecommunications Act, the cable industry began a system-wide overhaul of its infrastructure, enabling it to provide its customers with traditional video programming as well as cable telephony and high-speed Internet access service. *Seventh Annual Report on Video Programming*, 2001 FCC LEXIS at ¶¶ 10-11.

Today, the CATV industry has become the cable multimedia industry. Cable operators provide high-speed Internet access to approximately 3.2 million customers, surpassing the number of subscribers using wireline, wireless, or satellite technologies for high-speed Internet access. *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 15 F.C.C.R. 20913, ¶¶ 187-202 (2000) ("Advanced Services Report"). This is in addition to the cable multimedia industry's current customer base of 69 million households. *Cable TV Handbook*, <http://www.ncta.com/pdf_files/A-CableFacts.pdf> (visited May 18, 2001). Industry consolidation has resulted in the top four cable multimedia companies claiming over 50% of all subscribers and the top ten over 80%. *Seventh Annual Report on Video Programming*, 2001 FCC LEXIS at Table C-3. All of this contributes to the cable industry's annual revenues, which, as of last year, exceeded $42 billion. *Cable TV*

Handbook, <http://www.ncta.com/pdf_files/A-CableFacts.pdf>(visited May 18, 2001).

C. The 1996 Amendments To The Act And The FCC's Actions.

As part of Congress' express purpose of facilitating a competitive telecommunications marketplace, the 1996 Telecommunications Act amended the Pole Attachments Act in several relevant ways. It expanded the protections of the Pole Attachments Act to attachments made by telecommunications carriers known as Competitive Local Exchange Carriers ("CLECs"), but did not apply the Act to Incumbent Local Exchange Carriers ("ILECs"). 47 U.S.C. § 224 (a)(5) (Supp. IV 1998). (In plain English, Congress sought to help the new guys, but not the old guys.)

To reflect the inclusion of telecommunications carriers in the Act, Congress also changed the Act's rate provision to provide for two separate rates rather than the previous single cable rate. The Act now provides for one rate for attachments by cable television systems which are used solely to provide cable services and another rate for attachments which are used to provide telecommunications services. *See* 47 U.S.C. §§ 224(d) and (e) (1994 & Supp. IV 1998). The primary difference between the two rates is that the telecommunications rate accounts for both the unusable and usable space on the pole while the cable rate only accounts for the usable space. *Id.*

Another relevant change to the Act was that Congress made it mandatory for pole owners to provide cable television systems and telecommunications providers access to utility poles, except where capacity, safety, engineering or reliability concerns made access unreasonable. 47 U.S.C. § 224(f) (Supp. IV 1998). Where the 1978 version of Act allowed only for voluntary access, *Florida Power Corp.*, 480 U.S. at 251, the 1996 version of Act effects a Fifth Amendment

taking of pole owners' property. *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000) ("*Gulf Power II*"), *cert. granted*, 121 S. Ct. 879 (2001): *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999) ("*Gulf Power I*").

In adopting rules and regulations implementing the 1996 amendments, the Commission refused to determine whether Internet access service constituted "solely cable service," "telecommunications service," or both, or neither. *In re Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 F.C.C.R. 6777, 6795-96 (1998) ("*1998 Report Order*"). Instead, the Commission purported to exercise jurisdiction under subsection (b)(1) of the Act and determined that the rate for solely cable service would nevertheless apply to attachments used to provide both Internet access service and cable service. *Id.* at 6794.

The Commission also ruled that the Pole Attachments Act would now apply to attachments of wireless equipment. *1998 Report and Order*, 13 F.C.C.R. at 6798. During the entire existence of the Act and its purported applicability to "any attachment," the FCC had never regulated any attachment by a cable company besides its wires; indeed, the FCC's promulgated formula rate for attachments spoke only in terms of wires, presuming that the attachment to be regulated would take up only about one foot of the usable space on a pole. *In the Matter of Amendment of Rules and Policies Governing Pole Attachments*, 15 F.C.C.R. 6453, 6466 (2000) ("*2000 Report and Order*"); *In the Matter of Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 72 F.C.C. 2d 59, 70 (1979) ("*1979 Adoption of Rules for Pole Attachments*"). Despite this long-standing interpretation, and the fact that the 1996 amendments had not changed the Act's limited jurisdiction over poles used for "wire communications," 47 U.S.C. § 224(a)(1) (1994 & Supp. IV

1998), the Commission determined that the Act applied to wireless carriers because they are telecommunications carriers. *1998 Report and* Order, 13 F.C.C.R. at 6798.

In the consolidated appeals of the Commission's *1998 Report and Order*, the United States Court of Appeals for the Eleventh Circuit held that the Act did not apply to "pole attachments for Internet service." *Gulf Power II*, 208 F.3d at 1276-78. The Court of Appeals also held that the Act does not "provide the FCC authority to regulate the placement of wireless carriers' equipment." *Id.* at 1275. On January 22, 2001, the Court granted Petitions for *Writ of Certiorari* filed by the Government and the National Cable Television Association. *National Cable TV Ass'n v. Gulf Power Co.*, 121 S. Ct. 879 (2000).

SUMMARY OF THE ARGUMENT

A trilogy of recent decisions by the Court has etched a principle with compelling relevance here. Congress does not leave the "determination whether an entire industry will be entirely or even substantially" regulated to an agency's exploitation of subtle gaps, vague authority and ancillary terms in an act; "it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 121 S. Ct. 903, 909-10 (2001); *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000); *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994). Petitioners urge the Court to join their quest for two elephants in the mouseholes of the Act: FCC jurisdiction over pole attachments used for Internet access service, and attachment of wireless telecommunications equipment. Congress, however, enacted no such elephants.

I. The Act Does Not Give The FCC Jurisdiction To Regulate Rates For Pole Attachments Providing Simultaneous Cable And Internet Access Services.

Congress unmistakably engraved its policy as to the Internet, truly a large new breed. "It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, **unfettered by Federal or State regulation** . . . ." 47 U.S.C. § 230(b)(2) (Supp. IV 1998) (emphasis added). This unambiguous policy pronouncement in a contemporaneous provision of the 1996 Telecommunications Act precludes FCC jurisdiction over Internet access service based solely on a vague grant of general jurisdiction under subsection (b) of the Pole Attachments Act. *See Brown & Williamson*, 529 U.S. at 137. Analysis of the entirety of the Communications Act as a coherent regulatory scheme, *see id.* at 143-44, underscores this policy, plainly showing that in the three instances where Congress intended to regulate some aspect of the Internet, it did so unambiguously. Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified as 47 U.S.C. § 231 (Supp. IV 1998)); Communications Decency Act, Pub. L. No. 104-104, 110 Stat. 133 (1996) (codified in various parts of 47 U.S.C.); 47 U.S.C. § 271(g)(2) (Supp. IV 1998). Congress plainly did not contradict the proclaimed "policy of the United States" through silence in the Pole Attachments Act. *See Whitman*, 121 S. Ct. at 909-10; *Brown & Williamson*, 529 U.S. at 159-60; *MCI Telecommunications*, 512 U.S. at 231.

Basic principles of statutory construction confirm this conclusion. The specific authority stated in subsections (d)(3) and (e)(1) of the Pole Attachments Act governs the general authority granted in subsection (b), and establishes that only two rates are authorized—one for cable service and one for telecommunications service. 47 U.S.C. §§ 224(d)(3) and (e)(1) (Supp. IV 1998). No rate is authorized for Internet access service, notwithstanding the identity of the provider, in keeping with the Act's recently clarified emphasis on the nature of service provided. Construing the Act narrowly, as must be done because it effects a taking, *Gulf Power II*, 208 F.3d at 1272-73; *Gulf Power I*, 187 F.3d at 1338; *GTE Service Corp. v. FCC*, 205 F.3d 416, 421-24 (D.C. Cir. 2000), the Court must deny Petitioners' expansive claim that simply because an entity is a "cable television system" it is forever entitled to the cable rate no matter the type of services it actually provides.

The FCC can regulate Internet access service only if it is "solely" cable service or telecommunications service. It fits neither historical definition. Both Congress and the FCC unambiguously have defined Internet access service as separate and distinct from cable or telecommunications service. 47 U.S.C. §§ 230(f)(2) and 231(e)(3) (Supp. IV 1998); *In re Fed.-State Joint Bd. on Universal Serv.*, 13 F.C.C.R. 11501, ¶ 66 (1998); *1998 Report and Order*, 13 F.C.C.R. at 6795; *In re Fed.-State Joint Bd. on Universal Serv.*, 12 F.C.C.R 87, ¶ 69 (1996). In fact, they have plainly stated that it cannot be telecommunications service. *Id.* Practical analysis further demonstrates that the essence of Internet access service—interactive, individual, specific and constant two-way information and data exchange—markedly differs from the essence of cable service—one-way transmission of video programming to subscribers generally. *See AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000). *See also Reno v. American Civil Liberties Union*, 521 U.S. 844, 850-52 (1997).

Respondents' plain language interpretation of the Pole Attachments Act comports precisely with Congress' stated policy goals. Repudiating the FCC's unilateral assertion of authority over Internet access service will leave the Internet "unfettered by federal . . . regulation . . ." and will place cable

multimedia companies on equal footing with their competitors in the Internet access service industry. *See* 47 U.S.C. §§ 157 and 230(b)(2) (1994 & Supp. IV 1998). All industry players will pay market-based rates for infrastructure, rather than cable multimedia companies exploiting the Act to their anti-competitive advantage. The correct interpretation of the Act will also achieve Congress' stated goal of leveling the playing field between cable companies and telecommunications companies providing the same services. S. Conf. Rep. No. 104-230, at 178 (1996). Petitioners' interpretation, on the other hand, would allow multimedia companies providing Internet access service to pay the minimal "cable rate," a rate many times lower than the minimum rate telecommunications carrier competitors providing the same Internet access service will have to pay. *In the Matter of Implementation of Section 703(e) of The Telecommunications Act of 1996, Partial Order on Reconsideration,* FCC 01-170 (released May 25, 2001) ("*Consolidated Partial Reconsideration Order*").[2]

II. The Act Does Not Give The FCC Jurisdiction To Regulate Attachments Of Wireless Equipment.

The nooks and crannies of the Pole Attachments Act reveal no hidden jurisdiction for the FCC to regulate attachments of wireless telecommunications equipment. Instead, the plain language of the Act speaks only of wires—FCC jurisdiction only over utilities which use their poles for "wire communications," 47 U.S.C. § 224(a)(1) (1994 & Supp. IV 1998), and rates for attachments calculated based on space

[2] Although the issue is not before the Court, *see infra* at n. 14, telecommunications providers simultaneously providing Internet access service and telecommunications service would, at a minimum, have to pay the "telecommunications rate." *See* 47 U.S.C. § 224(e)(1) (Supp. IV 1998). That rate is markedly higher than the "cable rate" because it accounts for both usable and unusable space, while the cable rate accounts only for usable space. *Compare* 47 U.S.C. § 224(d)(3) (Supp. IV 1998), *with* 47 U.S.C. § 224(e)(1) (Supp. IV 1998).

used for "wires, cables, and associated equipment." 47 U.S.C. § 224(d)(2) (1994). The FCC's jurisdiction over "any attachments," 47 U.S.C. § 224(a)(4) (1994 & Supp. IV 1998), must be parsed carefully; while "any" indeed means "any," "attachment" means wires. That conclusion is not only the implication of the Act's plain language, but is also consistent with Congress' jurisdictional intent. Through the Act, Congress intended to grant the FCC jurisdiction over only the "communications space" on the pole. S. Rep. No. 95-580, at 15 (1978), *reprinted in* 1978 U.S.C.C.A.N. 109, 123. Congress further intended to grant the FCC jurisdiction over poles only to the extent they may be bottleneck facilities, which they plainly are not for wireless equipment. *Gulf Power II*, 208 F.3d at 1274-75.

Although the Pole Attachments Act unambiguously bars the FCC's interpretation, even *Chevron* step two bars the FCC's interpretation as unreasonable. *See Whitman*, 121 S. Ct. at 916. During the entirety of the Act's life span, the FCC has never interpreted its jurisdiction over an "attachment" to apply to anything but wires. That was true from 1978 to 1996 (and, indeed through today) when cable companies routinely used equipment heavily associated with their wires, including wireless "headend" transmitters and receivers, and power boosters. It has also been true since 1996, during which time the FCC has refused, or been unable to, apply its rules to wireless equipment, the "unusual requirements" of which the FCC admits will create "difficulties" with its regulations based on usable space. *Consolidated Partial Reconsideration Order*, FCC 01-170 at ¶¶ 43-45; *1998 Report and Order*, 13 F.C.C.R. at 6799, 6879.

The FCC's untoward interpretation of the Act may also create unwarranted and unfairly burdensome regulatory inequities, such as requiring pole owners to register their poles with the FCC as "antenna structures," thus potentially subjecting them to fines of up to one million dollars for

regulatory violations, *see* 47 U.S.C. §§ 503(b)(1)(B) and (b)(2)(B) (1994); 47 C.F.R. § 17 (2000), and requiring them to navigate a maze of state and local regulatory control over wireless equipment. *See* 47 U.S.C. § 332(c) (1994 & Supp. IV 1998). Finally, and perhaps most telling, the FCC's assertion of jurisdiction to regulate rates for placement of wireless equipment runs counter to Congress' intent to leave the wireless industry a freely competitive market, a policy choice that has helped the wireless industry thrive without the FCC's paternalism. *See In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 15 F.C.C.R. 17660, 17668 (2000) ("*2000 CMRS Report*").

ARGUMENT

I. THE POLE ATTACHMENTS ACT DOES NOT GIVE THE FCC JURISDICTION TO REGULATE RATES FOR POLE ATTACHMENTS PROVIDING SIMULTANEOUS CABLE AND INTERNET ACCESS SERVICES.

A. Congress Expressly Repudiated Any Implied Regulatory Jurisdiction Over Any Aspect Of The Internet.

Cost regulation, in the form of FCC jurisdiction over pole attachment rates, is explicit for both cable television and telecommunications attachments under the 1996 Telecommunications Act. 47 U.S.C. §§ 224(d)(3) and (e)(1) (Supp. IV 1998). Congress spoke clearly on that point. Congress said nothing at all, however, about similar cost regulation for Internet access service: nothing in the Pole Attachments Act, nothing in the legislative history. Why not? Because, said Congress when it enacted the 1996 Act's only regulatory imposition over the Internet, "[i]t is the policy of the United States . . . to preserve the vibrant and competitive

free market that presently exists for the Internet and other interactive computer services, **unfettered by Federal or State regulation** . . . ." 47 U.S.C. § 230 (b)(2) (Supp. IV 1998) (emphasis added). Deafening silence in the Pole Attachments Act, coupled with an equally deafening repudiation of Internet regulation, leaves no reasonable doubt that Congress had no intention of subjecting Internet access service to cost regulation under the Pole Attachments Act.

Petitioners ignore both Congress' statement and its silence. Instead, Petitioners propose that if certain companies (but not all of their competitors) offer any cable or telecommunications service, the Act should be interpreted to extend FCC regulation to pole attachments used by those particular companies (but not their competitors) to provide Internet access service. Viewed another way, Petitioners assert that Congress intended some Internet access service attachment rates to be regulated, and others not, solely as a function of the particular non-Internet access services offered by the provider. Petitioners' search through the Pole Attachments Act and its history for inferences on which to base an implied grant of jurisdiction over Internet access services is reminiscent of Dashiell Hammett's "blind man in a dark room hunting for a black hat that isn't there." The tools of statutory construction cannot build something from nothing.

When Congress wanted to address, define, or categorize Internet access service in the 1996 Telecommunications Act, it did so explicitly and unambiguously, as in 47 U.S.C. § 230, where it addressed obscenity over the Internet.[3] Similarly, when Congress addressed Internet access services in the 1998 amendments to the Communications Act, it did so explicitly

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[3] "Interactive computer service" is defined to include an information service providing or allowing access by multiple users to a computer system, including an Internet access service. 47 U.S.C. § 230(f)(2) (Supp. IV 1998).

and provided a formal definition.[4] Thus, no legitimate basis exists for believing Congress somehow meant to apply the Pole Attachments Act to commingled Internet access service, but forgot to say so explicitly. "Congress," the Court has held, "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman*, 121 S. Ct. at 909-10 (internal citations omitted).[5] Rather than chase Petitioners' elusive elephant, Respondents respectfully urge the Court to follow its practice of refusing to find implicit in a statute authority which has been expressly granted elsewhere, *id.*, or, for that matter, which has been expressly denied elsewhere. *See Brown & Williamson*, 529 U.S. at 137 (Congress' statement of policy regarding the tobacco industry in a "provision of the United States Code currently in force" precluded the Food and Drug Administration's regulation of tobacco as a drug under the separate provisions of the Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-397). The Pole Attachments Act simply does

[4] 47 U.S.C. § 231(e)(4) (Supp. IV 1998).

[5] The applicability of the Court's metaphor is made clear by another of the Court's recent decisions, *Reno v. ACLU*, 521 U.S. 844 (1997). "The Internet is a unique and wholly new medium of worldwide human communication." *Id.* at 850 (internal quotations and citation omitted). It has experienced "extraordinary growth" and at the time Congress passed the Telecommunications Act, the number of Internet users was expected to "mushroom" from 40 million to "200 million by 1999." *Id.* Internet access tools include a "wide variety of communication and information retrieval methods [which] constitute a unique medium—known to its users as 'cyberspace'—located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet." *Id.* at 851. "It is no exaggeration to conclude that the content on the Internet is as diverse as human thought." *Id.* at 852. One shudders to think that Congress—which has carefully addressed things such as make-up and Father's Day—left this unique method of communicating all human thought to the FCC's best guess.

not confer FCC jurisdiction over attachments used to provide Internet access service.

B. The Unambiguous Plain Meaning Of The Act's Specific Ratemaking Provisions Limits The FCC's Jurisdiction To Attachments Used Solely For Cable Service Or For Telecommunications Service.

Petitioners argue that Congress intended the FCC's general authority under 47 U.S.C. § 224(b)(1) to ensure that the "rates, terms, and conditions of pole attachments are just and reasonable" to extend to rates for attachments used to provide Internet access service. Petitioners base their argument on the phrase "any attachment" in 47 U.S.C. § 224(a)(4), which defines "pole attachment" as "any attachment by a cable television system or provider of telecommunications service" to an electric utility's[6] poles. 47 U.S.C. § 224(a) (1994 & Supp. IV 1998).[7] Petitioners' narrow focus on Section 224(b), however, misses the point. Isolating sub-section (b) and analyzing it in a vacuum ignores the import of more recent, more specific language in Sections 224 (d)(3) and (e)(1) that expressly limits the FCC's ratemaking powers to

[6] Although the Act discusses attachments to poles owned by other utilities—such as gas, water and steam utilities—and to other infrastructure, including ducts, conduits and rights-of-way, for ease of reference this brief refers only to electric utilities and poles. *See* 47 U.S.C. § 224(a)(1) (1994 & Supp. IV 1998).

[7] The Federal Petitioners also rely to some extent on 47 U.S.C. § 224(c), which is simply irrelevant to this proceeding. Section 224(c) provides for a "reverse preemption" scheme whereby a state may assert jurisdiction over the regulation of pole attachments in accordance with the sections specified conditions. The Federal Petitioners claim that Section 224(c) is illuminating and demonstrates Congress' ability to place limitations on the FCC's jurisdiction when it so desires. This section in fact speaks not to the contours of the FCC's jurisdiction over rates pursuant to the Act, but rather the division between state and federal regulation of pole attachments *in toto*.

attachments used solely to provide cable and telecommunications services.

Section 224(d) imposes explicit limitations on the general ratemaking jurisdiction conferred by Section 224(b). Subsections 224(d)(1) and (d)(2) establish the specific methodology to be used in setting rates, and subsection (d)(3) specifies when this methodology will apply to cable-only attachments and when to telecommunications attachments.[8] Section 224(d)(3) could not be more explicit in its reference to pole attachments used **"solely to provide cable service."** 47 U.S.C. § 224(d)(3) (Supp. IV 1998) (emphasis added). Subsection 224(e)(1) similarly specifies the FCC's rulemaking and ratemaking jurisdiction for "pole attachments used by telecommunications carriers **to provide telecommunications services.**" 47 U.S.C. § 224(e)(1) (Supp. IV 1998) (emphasis added). There is nothing in these, the Act's only substantive ratemaking provisions, to suggest that the FCC could also engage in ratemaking for attachments used for other services the Act does not address.

"However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. . . . Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'" *Clifford F. MacEvoy*

[8] "For purposes of subsection (b) of this section, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by," in essence, the fully allocated costs of providing pole attachments. 47 U.S.C. § 224(d)(1) (1994); *Gulf Power I* at 1327 n.2. "This subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service. Until the effective date of the regulations required under subsection (e), this subsection shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide any telecommunications service." 47 U.S.C. § 224(d)(3) (Supp. IV 1998).

Co. v. United States, 322 U.S. 102, 107 (1944) (quoting *Ginsberg & Sons v. Popkin*, 285 U.S. 204 (1932)). *See United States v. Romani*, 523 U.S. 517, 530-31 (1998); *Bulova Watch Co. v. United* States, 365 U.S. 753, 758 (1961); *Missouri v. Ross*, 299 U.S. 72, 75 (1936). This is especially so because Sections 224(d)(3) and (e)(1) were enacted in 1996, eighteen years after the more general language of Section 224(b) relied on by Petitioners. *See Brown & Williamson*, 520 U.S. at 143 (citing *Romani*, 523 U.S. at 530-31).

While Section 224(b) grants the FCC the general authority to regulate the rates, terms, and conditions of pole attachments, the more specific language of Section 224(d)(3) and Section 224(e)(1) makes clear that only attachments used for solely cable service or telecommunications service are subject to the regulated cable or telecommunications rate. The Eleventh Circuit thus correctly held that the Act authorizes two specific rates only, not a multi-service or hybrid rate under subsection 224(b)(1), and that for "the FCC to be able to regulate the rent for an attachment that provides Internet access service then, Internet service must qualify as either a cable service or a telecommunications service." *Gulf Power II*, 208 F.3d at 1276.

This conclusion is consistent with the principle that a statute must be interpreted as a harmonious whole, so that each provision is read in context and with a view to its place in the overall regulatory scheme. *Brown & Williamson*, 529 U.S. at 132-33. Each of the 1996 amendments creating Sections 224(d)(3) and (e) through (i) reflects a specific delineation of the general authority granted the FCC over rates, terms and conditions of pole attachments under Section 224(b). Thus, just as Sections 224(d) and (e) define permissible rates, Sections 224(f) and (h) define the terms and conditions of access. Holding that the FCC could promulgate a non-cable, non-telecommunications, or hybrid rate under Section 224(b), despite the proscriptions of Sections 224(d)

and (e), would be just as erroneous as holding that the FCC could act under the general language of Section 224(b) to allow electric utilities to condition access on a discriminatory basis, or to allow electric utilities to deny access for reasons other than those stated in Section 224(f)(2).

As all Petitioners agree, "in any case of statutory construction, [the] analysis begins with the language of the statute. . . . And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (citations and internal quotation marks omitted); *see* Brief of the Federal Petitioners at 16-1; NCTA Brief at 27. Where Congress has spoken directly to the precise question at issue, an agency's interpretation is entitled to no deference and the Court's "inquiry is at an end; the court must give effect to the unambiguously expressed intent of Congress." *Brown & Williamson*, 529 U.S. at 132 (internal citations and quotation marks omitted). As this Court thrice recently has held, "it is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as [vague] permission . . . ." *Id.* at 160 (quoting *MCI Telecommunications*, 512 U.S. at 231 (rejecting FCC's argument that it had implicit authority to establish regulation contrary to Congress' express statements)). In a conclusion equally *apropos* here, the Court held that the FDA does not have jurisdiction to regulate tobacco because the Court was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion. To find that the FDA has authority to regulate tobacco products, one must not only adopt an extremely strained understanding of [terms in] the Act . . . but also ignore the plain implication of Congress's subsequent tobacco-specific legislation." *Id.* *See also Whitman*, 121 S. Ct. at 910.

The Eleventh Circuit correctly followed this reasoning when it stated: "the straightforward language of subsections (d) and (e) directs the FCC to establish two specific just and reasonable rates, one for cable television systems providing solely cable service and one for telecommunications carriers providing telecommunications service; no other rates are authorized." *Gulf Power II*, 208 F.3d at 1276 n.29.

Petitioners' insistence that the general language of Section 224(b) is controlling also ignores the judicial record to which Congress was reacting when it enacted Sections 224(d)(3) and (e) in 1996. Prior to the 1996 amendments, the vague language of Section 224(b) caused the Act arguably to be ambiguous as to whether Congress' regulatory emphasis was on the service provided (*i.e.*, any attachment used for cable service) or the attaching entity (*i.e.*, any attachment for any purpose by a cable company). *Texas Utilities v. FCC*, 997 F.2d 925, 930 (D.C. Cir. 1993). *Texas Utilities* thus held that it was reasonable for the FCC to require an electric utility to charge a cable company the same rate for commingled conventional video programming and "nonvideo communications services, such as data transmission." *Id.* at 927, 935. That decision was in keeping with the FCC's uniform interpretation of the Act since 1978 as requiring "a single regulated rate for pole attachments" that "must fall within the parameters established by Section 224(d)(1)" and leaving "no provision for disparate rates based on the type of service provided." *Heritage Cablevision v. Texas Utilities Electric Co.*, 6 F.C.C.R. 7099, 7105 (1991). Congress is presumed to have been aware of the FCC's and the D.C. Circuit's interpretation of the Act. *See Rodriguez v. United States*, 480 U.S. 522, 525 (1987); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). The Eleventh Circuit thus correctly held that because in 1996 Congress stated in Section 224 (d)(3) that "solely" cable service would "receive regulated rates . . . we

now know that the statute emphasizes the type of service over the entity acquiring the attachment." *Gulf Power II*, 208 F.3d at 1277 n.32.

Petitioners' expansive interpretation of Section 224(b) also ignores the requirement that the Act be construed narrowly. A provision of the 1996 Telecommunications Act that effects a taking must be interpreted so as to take as little private property as possible. *See GTE Service Corp.*, 205 F.3d at 422-24. *See also United States v. Carmack*, 329 U.S. 230, 243 n.13 (1946).[9] In *GTE Service Corp.*, which followed this Court's holding in *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999), the FCC had issued rules under Section 251(c)(6) of the 1996 Act which imposed a duty on ILECs to provide physical or virtual collocation to CLECs. The FCC's rules essentially maximized the requirement for more invasive physical collocation while minimizing the opportunity for less intrusive virtual collocation. *GTE Service Corp.*, 205

[9] This rule is an extension of the principle that "[d]eference to an agency interpretation is inappropriate not only when it is conclusively unconstitutional, but also when it raises serious constitutional questions." *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1231 (10th Cir. 1999). *See also Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-76 (1988). It also naturally flows from the well-settled maxim that a statute in derogation of common law property rights, delegating the authority to take those rights for a public use, should be strictly construed against the taking party. *See, e.g., Bell Atlantic Tel. Co. v. FCC*, 24 F.3d 1441, 1445 (D.C. Cir. 1994); *State of Missouri ex rel. Missouri Cities Water Co. v. Hodge*, 878 S.W.2d 819 (Mo. 1994) (such statutes "must be strictly construed, and the person or body claiming the right to exercise such delegated power must be able to point to the statute which either expressly or by necessary implication confers that right"); John Lewis, *A Treatise on Eminent Domain in the United States* § 388 (3d ed. 1909). Takings authority not expressly granted may be implied "only as a matter of necessity, where the grant [of authority] itself would be defeated unless [takings] power were implied." *Bell Atlantic*, 24 F.3d at 1446 (internal quotations and citations omitted).

F.3d at 418, 420. The D.C. Circuit indicated that Section 251(c)(6) provided "explicit congressional author-ization" for a taking, but held that the provision should be construed to avoid an unnecessary taking of private property. *Id.* at 421, 423 (internal quotations and citations omitted).[10]

[10] The Court has never decided the precise issue addressed by the D.C. Circuit last year in *GTE Service Corp.*; *i.e.*, whether to construe narrowly an act that authorizes a taking in determining the nature and extent of property it takes. Relying on *Iowa Utilities Board*, the D.C. Circuit held that terms in a statute must be given their "ordinary and fair meaning" so as to limit the taking "to that which is required to achieve a desired goal." The narrow construction was "particularly relevant" to avoid "an unnecessary taking of private property." 205 F.3d at 423. Although *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407 (1992) stated that *Chevron* deference should be given to an agency's interpretation of a statute even though it effects a taking, the case is inapposite for several reasons. First, *Boston & Maine* did not address the determination of the nature and extent of property to be taken, but rather whether a statute required the agency to make a factual finding that the property was actually needed as a prerequisite to taking the property. 503 U.S. at 420-21. There simply was no issue as to the nature and scope of the taking, thus the Court found it appropriate to defer to the agency's determination that the statute did not mandate a factual finding. *Id.* Second, *Boston & Maine* involved a statute where the federal agency, not a private entity, effected a taking. *Id.* at 421. The Court therefore distinguished the case from its earlier holding that statutes granting takings authority to a private entity "are, in their very nature, grants of limited powers. They do not include sovereign powers greater than those expressed or necessarily implied, especially against others exercising equal or greater public powers. In such cases the absence of an express grant of superiority over conflicting public uses reflects an absence of such superiority." *Carmack*, 329 U.S. at 243 n.13. *Carmack*, and not *Boston & Maine*, applies to the Pole Attachments Act, as it grants the cable company or telecommunications carrier the express right to force the electric utility to relinquish its property upon request. 47 U.S.C. § 224(f)(1) (Supp. IV 1998). Only if the pole owner refuses to agree to the statutorily prescribed rate and the attacher files a pole attachment complaint does the FCC get involved. *See* 47 C.F.R. § 1.1404 (2000). Third, *Boston & Maine* involved the regulatory authority of the Interstate Commerce Commission, a single agency with plenary and exclusive

The mandatory access regime implemented in the 1996 amendments to the Act has been held to effect a taking of Respondents' property. *Gulf Power II* at 1272-73; *Gulf Power I* at 1338.[11] The property taken is the electric utility's property interest in selling space for pole attachments for solely cable services and telecommunications services at market rates. Just as with the FCC's choice of physical collocation over virtual collocation, the FCC cannot be given broad discretion to expand the taking and force electric utilities to part with their property interest in selling pole attachments for Internet access service at market rates. The Act must be construed to avoid, where possible, expanding rate regulation over access for services, or combinations of services, not clearly covered by the Act.[12] The FCC's

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authority over railroad regulation. 49 U.S.C. § 10501(b)(2) (1994) ("jurisdiction of the Board over transportation by rail carriers . . . is exclusive"); *see, e.g., Burlington Northern Santa Fe Corp. v. Anderson*, 959 F. Supp. 1288 (D. Mont. 1997). Here, in contrast, the FCC has very limited jurisdiction over the property of electric utilities; indeed, only to the extent pole attachments are made in the "communications space." Finally, the statute at issue in *Boston & Maine* was passed in specific response to the D.C. Circuit's decision that the prior version of the statute did not authorize the taking effected by the ICC, while a petition for rehearing was pending before the D.C. Circuit. The case represents a unique instance where Congress spoke definitively to approve an agency's position on the very issue the Court faced, thus making deference wholly appropriate.

[11] The Eleventh Circuit has twice held that the Act effects a taking, and neither holding has been put before this Court. *See National Cable TV Ass'n. v. Gulf Power Co.*, 121 S. Ct. 879 (2001).

[12] The Act must also be read narrowly to avoid a constitutional dilemma of which Justice Thomas recently invited analysis—the non-delegation doctrine. *Whitman*, 121 S. Ct. at 920. (Thomas, J., concurring) ("I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.' . . . On a future day, however, I would be willing to

unilateral decision that it may take the monumental step of requiring regulated rates for simultaneous cable and Internet access service, without clear Congressional directive, is unlawful.

Finally, even if one believes that the phrase "any attachment by a cable television system" in Section 224(a)(4) means any attachment for any purpose, including commingled Internet access service, the argument is of no avail to Petitioners. As more and more cable companies provide telecommunications service and are thus regulated by the FCC as common carriers, their facilities are considered a "cable system" only "to the extent such facility is used in the transmission of video programming directly to subscribers . . . ." 47 U.S.C. § 522(7) (1994 & Supp. IV 1998). And because the provision of Internet access service is not video programming, *see* 47 U.S.C. § 231(e)(4) (Supp. IV 1998); *City of Portland*, 216 F.3d at 876-77 (9th Cir. 2000). Petitioners cannot bootstrap Internet access service into the definition of cable television system.[13]

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address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers.").

[13] Ultimately, even if the weight of the foregoing did not establish that the FCC has violated the unambiguous language of the statute, it would at least establish that the FCC's interpretation is unreasonable. Should the Court find the Act "silent or ambiguous with respect to the issue [it] must defer to a reasonable interpretation made by the" FCC. *Whitman*, 121 S. Ct. at 916 (quoting *Chevron*, 467 U.S. 837, 844 (1984)). However, where, as here, "the agency's interpretation goes beyond the limits of what is ambiguous and contradicts what . . . is quite clear" the interpretation is unlawful. *Id.* Indeed, the Court has recently held, in a similar analysis, that the FCC transgressed the bounds of reasonable interpretation in applying another provision of the 1996 Act. *Iowa Utilities Board*, 525 U.S. 366. In *Iowa Utilities Board*, the Court vacated a similarly overbroad FCC rule requiring unrestricted access to an ILEC's facilities. "[T]he Act requires the FCC to apply some limiting standard, rationally related to the goals of the Act, which it has simply failed to do."

C. Simultaneous Internet Access Service And Cable Service Is Neither Solely Cable Service Nor Telecommunications Service.

The FCC can regulate rates for pole attachments providing simultaneous cable service and Internet access service only if those attachments are either: (1) "any pole attachment used by a cable television system solely to provide cable service" or (2) "any pole attachment used by a cable system . . . to provide telecommunications service." *See* 47 U.S.C.

Id. at 388. In an instructive observation, the Court concluded that, had Congress wanted to provide rights "on a basis as unrestricted as the scheme the Commission has come up with, it would . . . simply have said (as the Commission in effect has)" so and "would not have included any" limiting provision. *Id.* at 390.

Following *Iowa Utilities Board*, the United States Court of Appeals for the District of Columbia Circuit similarly applied a limiting rule to FCC regulations issued under other provisions of the 1996 Act. *GTE Service Corp.*, 205 F.3d at 423-24. In *GTE Service Corp.*, the court found that certain terms in 47 U.S.C. § 251(c)(6) were ambiguous and, turning to *Chevron* step two, emphasized that it would "not uphold an interpretation that diverges from any realistic meaning of the statute." *Id.* at 421, 423 (internal quotations and citations omitted). The court vacated the "offending portions" of the FCC's rule, stating that the "FCC cannot reasonably blind itself to statutory terms in the name of efficiency. *Chevron* deference does not bow to such unbridled agency action." *Id.* at 423-24 (citing *Iowa Utils. Bd.*, 525 U.S. at 389).

In the end, the FCC's attempt to find hidden jurisdiction in the interstices of subsections (a)(4) and (b)(1) of the Act is unreasonable, in a way similar to the EPA's misguided interpretation in *Whitman*. "To use a few apparent gaps in [subsection (d)] to render its textually explicit applicability to [cable service pole attachment rates] utterly inoperative is to go over the edge of reasonable interpretation. The [FCC] may not construe the statute in a way that completely nullifies textually applicable provisions meant to limit its discretion. . . . An interpretation of [subsection (d)] so at odds with its structure and manifest purpose cannot be sustained." *See Whitman*, 121 S. Ct. at 919.

§ § 224(d)(3) and (e)(1) (Supp. IV 1998).[14] Internet access service simply cannot be shoehorned into either of these terms.

1. Congress And The FCC Have Defined Internet Access Service As Distinct From Cable Service Or Telecommunications Service.

Both Congress and the FCC have already defined Internet access service as being neither cable service nor telecommunications service. Although Petitioners ignore Congress' definitions, nonetheless those definitions demonstrate two things: (1) Congress was and is aware of the Internet, and in the rare instances where it wanted to regulate some aspect of that freewheeling communications market, it did so; and, (2)

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[14] The issue of whether the FCC can regulate a pole attachment used by a telecommunications carrier, as opposed to a cable multimedia company, to provide commingled telecommunications service and Internet access service is not before the Court. Although the Eleventh Circuit stated "the 1996 Act does not authorize the FCC to regulate pole attachments for Internet service," *Gulf Power II*, 208 F.3d at 1278, the "holding" was stated in loose language. The reality is that the Eleventh Circuit was presented with, analyzed, and decided the issue of whether the FCC could regulate pole attachments of a cable television system providing commingled cable and Internet access service. *Id.* at 1276-77. The FCC decided only that the issue, *1998 Report and Order*, 13 F.C.C.R. at 6793-94, the Court granted *certiorari* only on that issue, *National Cable TV Ass'n v. Gulf Power Co.*, 121 S. Ct. 879 (2000) and the parties have briefed only that issue. *See* Brief of Federal Petitioners at 15; NCTA Brief at 27. Although *amicus* MCI Worldcom agrees that the commingled telecommunications and Internet access service issue is not before the Court, it has argued that, should the Court consider the issue, commingled telecommunications and Internet access service is subject to the telecommunications rate in subsection (e) of the Act. Brief of MCI Worldcom at 4 n.2. The Court's precedent makes clear, however, that it does not decide issues which were neither decided below nor argued by the parties. *See Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 314 n.25 (1985); *UPS v. Mitchell*, 451 U.S. 56, 60 n.2 (1981).

Congress does not consider Internet access service to be either cable or telecommunications service.

Congress has defined Internet access service in two portions of the Communications Act entitled the Child Online Protection Act, 47 U.S.C. § 231 (Supp. IV 1998), and the Communications Decency Act, 47 U.S.C. § 230 (Supp. IV 1998). In the 1996 Telecommunications Act, Congress defined Internet access service as a form of "Interactive computer service," which includes any information service providing or allowing access by multiple users to a computer system. 47 U.S.C. § 230(f)(2) (Supp. IV 1998). The 1998 Child Online Protection defined "Internet access service" as a "service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. **Such term does not include telecommunications services.**" 47 U.S.C. § 231(e)(4) (Supp. IV 1998) (emphasis added).[15]

Although the definitions of "Internet" and "Internet access service" appear elsewhere in the Communications Act than the Pole Attachments Act, the definitions must be read in *pari materia* with other Communications Act provisions defining communications services. *See Erlenbaugh v. United States*, 409 U.S. 239, 243-44 (1972). *See generally Brown & Williamson*, 529 U.S. at 132-33, 143 (terms in an act must be construed in context and with reference to implications of other provisions in relevant statutory scheme). It is telling that Congress deliberately refused to include or refer to such definitions in the Pole Attachments Act. It is more telling

[15] The Court has recently granted *certiorari* to hear a First Amendment challenge to certain provisions of the Child Online Protection Act. *Ashcroft v. American Civil Liberties Union*, 2001 U.S. LEXIS 3820 (May 21, 2001). That case does not bear on the definitions of the Internet and Internet access service.

that Congress squarely refused simply to incorporate or rely upon pre-existing definitions of cable and telecommunications service when it sought to regulate aspects of the Internet and Internet access service under the Communications Decency and Child Online Protection Acts. *See* 47 U.S.C. § 230 (Supp. IV 1998) and 47 U.S.C. § 231 (Supp. IV 1998). Congress unquestionably views Internet access service as neither cable nor telecommunications service.

The FCC itself agrees with Congress' conclusion. It has defined Internet service as an "information service," not as a cable or telecommunications service. *See In re Fed.-State Joint Bd. on Universal Serv.*, 13 F.C.C.R. at 11533 (1998) ("Internet service providers themselves provide information services, not telecommunications . . . .") ("*Universal Service Report*"); *1998 Report and Order*, 13 F.C.C.R. at 6795 ("The Universal Service Order concluded that Internet service is not the provision of a telecommunications service under the 1996 Act."); *In re Fed.-State Joint Bd. on Universal Serv.*, 12 F.C.C.R. at 123 (1996) ("Internet service does not meet the statutory definition of a 'telecommunications service.'") (cited in *Gulf Power II*, 208 F.3d at 1277). The 1996 Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing . . . ." 47 U.S.C. § 153(20) (Supp. IV 1998). Although the FCC has issued a *Notice of Inquiry* as to the classification of cable modem service for regulatory purposes, the FCC is bound by its prior classification of Internet access service unless and until it reaches an alternative conclusion based on a reasoned analysis indicating proper grounds for deliberately changing prior policies and standards. *See Committee for Community Access v. FCC*, 737 F.2d 74, 77 (D.C. Cir. 1984) (citing *Greater Boston Television Corp v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)).

Given that both Congress and the FCC have classified "Internet access service" as distinct from "cable service" or "telecommunications service," this Court's analysis need go no further. There is no legitimate basis for inferring that when Congress mentioned one of these terms, it actually meant the others or some combination thereof.

2. Internet Access Service Does Not Meet The Definition Of Cable Service.

Even focusing for the sake of argument on the Communications Act's definition of cable service, one cannot force the square peg of Internet access service into the round hole of Congress' long-standing definition. The relevant definitions from the 1996 Telecommunications Act establish that the "essence of cable service . . . is one-way transmission of programming to subscribers generally." *City of Portland*, 216 F.3d at 876; 47 U.S.C. §§ 522(2), (6) and (14) (1994 Supp. IV 1998). The Ninth Circuit therefore concluded that Internet access service cannot be cable service: "Internet access is not one-way and general, but interactive and individual beyond the 'subscriber interaction' contemplated by the statute. . . . [T]he communications concepts are distinct in both a practical and a technical sense." *City of Portland*, 216 F.3d at 876-77. *See also Reno v. ACLU*, 521 U.S. at 850-53 (describing highly personalized and interactive "wide variety of communication and information retrieval methods" available on Internet). [16] In addition, the Court of

[16] In a decision now pending on appeal before the Fourth Circuit, *MediaOne Group, Inc. v. GTE*, Docket No. 00-1680, the United States District Court for the Eastern District of Virginia held that Internet access service in fact falls within the Communications Act's definition of cable service. *MediaOne Group, Inc. v. County of Henrico, VA*, 97 F. Supp. 2d 712 (E.D.Va. 2000). An earlier portion of the opinion, however, apparently reached the opposite conclusion and declared that Internet access service was a telecommunications service. *Id.* at 714. The district court's decision is in fact strikingly devoid of factual exploration or legal analysis, and fails to consider, or even mention, the Ninth Circuit's decision in *City of Portland*. *Id.* at 715.

Appeals observed that "applying the carefully tailored scheme of cable television regulation to cable broadband Internet access would lead to absurd results, inconsistent with the statutory structure." *City of Portland*, 216 F.3d at 877. Such a decision "simply makes no sense in any respect, and would be infeasible in many respects." *Id.* (quoting *National Cable Tel. Ass'n v. FCC*, 33 F.3d 66, 75 (D.C. Cir. 1994) (refusing to regulate telecommunications carriers providing video dialtone service as cable television systems)).

The court of appeals below reached a consistent decision. It held that it could not "radically expand the scope of the definition of 'cable service' from a video base to an all-interactive-services base without some substantive indication from Congress that this is indeed its intent." *Gulf Power II*, 208 F.3d at 1277.[17] That decision was correct.

3. Internet Access Service Is Not A Telecommunications Service.

Internet access service likewise does not meet the definition of telecommunications service. "Telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. §153(43) (Supp. IV 1998). "Telecommunications service" is in turn defined as "the offering of telecommunications for a fee

[17] The 1996 Act made only one change to the preexisting definition of cable service, adding the words "or use." *See* 47 U.S.C. § 522(6)(A) (1994 & Supp. IV 1998). The Eleventh Circuit correctly found this change inconsequential, as it was made without substantive Congressional comment and, in any event, reflects only a slightly increased degree of consumer interaction in the selection of video programming. *Gulf Power II*, 208 F.3d at 1276-77.

directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46) (Supp. IV 1998).

Although neither the Federal Petitioners nor the NCTA argues the issue, *amici* claim that Internet access service constitutes telecommunications service because Internet access service in fact requires a telecommunications service to deliver the Internet access service. *See* Brief of United States Telecom Association and Verizon Communications at 17. *But cf. City of Portland*, 216 F.3d at 878. That argument has been flatly contradicted by Congress itself: Congress has categorically stated that Internet access service is not a telecommunications service. 47 U.S.C. § 231(e)(4) (Supp. IV 1998). Congress has also categorically stated that *amici's* model of a data service delivered via telecommunications is an information service, which necessarily means that it is distinct from a telecommunications service. 47 U.S.C. § 153(20) (Supp. IV 1998). Moreover, the FCC has held that "information services" and "telecommunications services" are "mutually exclusive," and that entities providing information services "are not thereby providing 'telecommunications service.'" *In re Fed.-State Joint Bd. On Universal Serv.*, 13 F.C.C.R. at 11507-08.[18] The FCC may not change course unless it does so based on a reasoned analysis indicating proper grounds for deliberately changing its prior decision, *Committee for Community Access*, 737 F.2d at 77, which explains why the FCC has not argued on appeal that Internet access service should be classified as a telecommunications service (or a cable service, for that matter).

[18] Although the FCC stated that its holding did not encompass "cable operators providing Internet access service," there is no reason it should not—the analysis is directly transferable. *Universal Service Report*, 13 F.C.C.R. at 11535.

4. Remand Is Unwarranted.

Petitioners request that the Court remand this case to the FCC in the event the Court determines that the issues before the Court depend on how Internet access service is classified. Petitioners' request must be denied for three reasons. First, unlike a situation where the need for agency expertise might support a remand, expertise is not a factor here. "[N]o amount of agency expertise" can change the straightforward interpretation of unambiguous statutory definitions. *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 368 (1986). Second, the interests of judicial economy weigh in favor of this Court not remanding a matter where there exists a sufficient basis for the Court to reach its own decision. *See Perkins v. Matthews*, 400 U.S. 379, 386-87 (1971). The Court can decide the issue before it based on clear statutory language, informed by directly relevant FCC decisions. Finally, even to the extent any further clarification might arguably be needed specifically on the issue of cable modem service, the FCC's undue delay in addressing the issue begs the Court to provide the clarification. Five years after the 1996 Act and the start of the current debate, the FCC has initiated no rulemaking addressing the classification of Internet access service. Indeed, as recently as May 25, 2001, the FCC confirmed that it would continue to delay the matter. *Consolidated Partial Reconsideration Order*, FCC 01-170 at ¶ 5.[19]

[19] Although the FCC issued a *Notice of Inquiry* as to the classification of cable modem service in September 2000, *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 15 F.C.C.R. 19287, no rule can result from the *Notice of Inquiry*. *See* 47 C.F.R. § 1.430 (2000).

D. Interpreting The Act Not To Provide The FCC Jurisdiction To Regulate Internet Access Service Fulfills Congressional Policy.

Congress has manifested two policy goals that are relevant here: (1) the Internet and Internet access service are to be left free and unfettered except where Congress has explicitly stated otherwise; and (2) competition on a level playing field in the telecommunications market is of paramount importance. These policies are consistent with one another and with the holding of the Eleventh Circuit.

1. The 1996 Act And Congressional Intent Seek To Leave Internet Access Services On An Unregulated Level Playing Field.

Having defined Internet access services as "information services"—the codified term for what the FCC first called "enhanced services"—the FCC must acknowledge that information services "have never been subject to regulation under the Communications Act." *City of Portland*, 216 F.3d at 878 (citing *Howard v. America Online, Inc.*, 208 F.3d 741, 752-53 (9th Cir. 2000)). *See also California v. FCC*, 905 F.2d 1217, 1223-25 (9th Cir. 1990)); 47 C.F.R. § 64.702(a) (2000). Indeed, Congress made this clear in the 1996 Act: "It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, **unfettered by Federal or State regulation** . . . ." 47 U.S.C. § 230(b)(2) (Supp. IV 1998) (emphasis added). Congress could not have made more plain its intent to keep government out of the Internet business. In keeping with this policy, in the rare (there are a total of three) instances in which Congress believed it necessary to regulate aspects of the Internet in the Communications Act, Congress did so explicitly and precisely. *See* Communications Decency Act, 47 U.S.C. § 230 (Supp. IV 1998); Child Online Protection Act, 47 U.S.C. § 231 (Supp. IV 1998); 47 U.S.C. § 271(g)(2) (Supp. IV 1998). Congress did not, as Petitioners contend, subtly hide regulation of the Internet in historical definitions of other services.

Petitioners contend that other provisions of the Communications Act suggest Congress sought to regulate Internet access service in the Act. In fact, those provisions support Respondents' analysis. The first states that "[i]t is the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media." 47 U.S.C. § 230(b)(1) (Supp. IV 1998). Congress chose to effectuate this policy by allowing the Internet to develop through free market forces.

Petitioners next note that Congress instructed the FCC to "encourage the deployment . . . of advanced telecommunications capability to all Americans . . . by . . . regulating methods that remove barriers to infrastructure investment." 47 U.S.C. § 157 (1994). Once again, Petitioners forget that Congress specifically distinguished Internet access services from telecommunications service. In addition, regulating the cost for Internet pole attachments pursuant to the FCC's rate formulas would actually create a barrier to infrastructure development by establishing an economically inefficient regulated market that sends the wrong signals for resource allocation. Low regulated pole attachment rates would give pole owners no incentive to create available pole space, such as by voluntarily building taller poles, and leave Internet access service providers with no incentive to establish their own infrastructure in areas and in ways that would most efficiently deploy Internet access cables. *See 2000 Report and Order*, 15 F.C.C.R. at 6461 (pole attachment rates closer to market prices give "the appropriate signal" for investment in facilities).[20]

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[20] Indeed, if, as Petitioners claim, Congress intended to facilitate the deployment of Internet access service "to all Americans" through the Pole

Keeping the FCC out of Internet cost regulation levels the playing field between Internet access service providers, thus promoting competition. Multimedia cable companies have three main competitors in the Internet access service business—ILECs, facilities-based Internet access service providers ("ISPs") and satellite Internet access service providers. *Advanced Services Report*, 15 F.C.C.R. at ¶¶ 96-111. Cable operators provide high-speed Internet access to approximately 3.2 million customers, surpassing the number of subscribers using wireline, wireless, or satellite technologies for high-speed Internet access. *Id.* at ¶¶ 187-201. Ironically, under the FCC's interpretation, the Pole Attachments Act protects only multimedia cable ISPs. ILECs are not entitled to regulated rates under the Act. 47 U.S.C. § 224(a)(5) (Supp. IV 1998). Neither are facilities-based ISPs, such as *amicus* Earthlink, which by definition are neither cable television systems nor telecommunications carriers. *Id.* at § 224(a)(4). And satellite Internet access service providers do not use pole attachments, but have a much higher cost for infrastructure investment than cable systems, and thus have higher retail rates. *See Advanced Services Report*, 15 F.C.C.R. at ¶¶ 187-202. Thus, rather than

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Attachments Act, it would have eliminated the exclusion from mandatory access afforded to railroads, cooperatively organized electric utilities, and government owned electric utilities. *See* 47 U.S.C. § 224(a)(1) (1994 & Supp. IV 1998). Instead, Congress has left access to utility poles looking something like a giant piece of Swiss cheese, with gaping holes, for example, in the Midwest where there are many electric cooperatives, and in the Northwest and California, where there are many municipal electric utilities. Cooperatives and municipal utilities, in fact, account for 2,921 of the 3,169 electric utilities in the United States. *See The Changing Structure of the Electric Power Industry 2000: An Update*, Energy Information Administration, Office of Coal, Nuclear, Electric and Alternate Fuels, U.S. Dep't of Energy (Oct. 2000) at 18-21. In Petitioners' view of the world, Congress must not have wanted to provide Internet access service to people other than those in higher suburban and urban socio-economic strata.

"penalizing" cable multimedia companies, refusing to confer subsidized rates for their commingled Internet access service under the Act simply levels the playing field among all Internet access service providers. Indeed, the result Petitioners seek would, unsurprisingly, leave all other ISPs with higher infrastructure costs, resulting in exactly the imbalanced regulated market and infrastructure investment disincentives Congress sought to avoid.

2. One Goal Of The 1996 Amendments To The Pole Attachments Act Is To Level The Playing Field Between Cable Systems And Telecommunications Carriers.

Denying multimedia cable companies the low cable-only rate for attachments providing Internet access service also serves Congress' primary goal in the 1996 Telecommunications Act—the promotion of free competition in the telecommunications industry. Not only is that the overarching stated goal of the 1996 Act, 1996 Telecommunications Act, Preamble, Pub. L. No. 104-104, 110 Stat. 56, 56, H.R. Conf. Rep. No. 104-458, at 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 124, it is also the reason subsection (d)(3) of the Act provides that when multimedia cable companies and telecommunications providers use pole attachments to provide telecommunication services, they will pay the same "telecommunications rate." 47 U.S.C. § 224(d)(3) (Supp. IV 1998).

The original rationale of the 1978 Act—protecting small, local cable companies from large utilities—no longer holds. The multimedia cable industry is a behemoth, expanding exponentially. There are now sixty-nine million households subscribing to cable service. *Cable TV Handbook*, <http://www.ncta.com/pdf_files/A-CableFacts.pdf> (visited May 18, 2001). The industry's annual revenues, as of last year, exceeded $42 billion. *Id.* Although the NCTA would have the Court believe that thousands of independent CATV

operators exist, the reality is that with industry consolidation the top four cable multimedia companies now claim over 50% of all subscribers and the top ten over 80%. *Seventh Annual Report on Video Programming*, 2001 FCC LEXIS at Table C-3. Indeed, against this backdrop of continuing industry growth and consolidation, Time-Warner successfully challenged FCC regulations that limited any one cable company from enlisting more than 30% of all subscribers nation-wide. *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1133-34 (D.C. Cir. 2001). Thus, it is simply untenable to argue that the industry needs government sanctioned regulation to protect it at the expense of electric utility ratepayers, and specious to argue that the Act should be stretched to accomplish that end.

In fact, the current path of multimedia cable companies is making them direct competitors to traditional telecommunications carriers, as the multimedia companies now stand "at the center of an ongoing telecommunications revolution with still undefined potential." *Turner Broadcasting System*, 512 U.S. at 627. They have overhauled their infrastructure to provide cable telephony and high-speed Internet access service. *Advanced Services Report*, 15 F.C.C.R. at ¶¶ 187-90.

In subsection (d)(3) of the Pole Attachments Act, Congress sought, among other things, to level the playing field between telecommunications carriers and their new competitors, cable multimedia companies. S. Rep. No. 103-267, at 65 (1994). Petitioners' interpretation of the Act, however, would tilt the scales in favor of multimedia cable companies at the expense of telecommunications carriers. While multimedia cable companies would pay the low regulated cable rate for Internet access pole attachments, ILECs and CLECs, the most likely source of new downward price competition in the Internet access service business, would have to pay a higher rate. Although the question of what rate a CLEC must pay for a pole attachment providing commingled telecommunications

service and Internet access service is not before the Court, it would either be the "telecommunications rate," which is likely several times higher than the cable rate, *see Consolidated Partial Reconsideration Order*, FCC 01-170 at ¶¶ 53-61, or an unregulated rate. Thus, at a minimum, a CLEC would pay significantly more for its Internet access service pole attachments than the multimedia cable companies seek to pay.

Ultimately, the Act serves to protect access to utility poles to provide cable and telecommunications service. It does not subsidize monolithic multimedia companies as they roll out new technology, to the disadvantage of their competitors and at the expense of electric ratepayers. And denying regulated rates for commingled cable service and Internet access service will not deny multimedia cable companies the other benefits of the Act, such as mandatory access. They will simply have to pay a market rate. This will not be a monopoly rate, but a rate that reflects just compensation for the utility property being taken, determined in accordance with applicable law governing the taking of property for public use. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

II. THE POLE ATTACHMENTS ACT DOES NOT APPLY TO ATTACHMENTS OF WIRELESS TELECOMMUNICATIONS EQUIPMENT.

The Federal Petitioners contend that the general reference to "any attachment by a cable television system or provider of telecommunications service" in the definition of "pole attachment" means that the Pole Attachments Act extends to attachments of wireless telecommunications equipment.[21] This argument ignores several key facts. Repeated clarifications in other provisions of the Act confirm that it relates strictly to "wire communications" and to "wires, cables, and

[21] Petitioner NCTA neither sought *certiorari* on this issue nor briefed it.

associated equipment." The FCC's own administration of the Act has never in eighteen years applied the Act to anything but wireline equipment. Applying the ratemaking and other provisions of the Act to wireless equipment will create nonsensical results. Turning poles into antenna structures will result in unwarranted and undue regulatory inequities. Finally, the FCC's regulation of wireless equipment under the Act would be unnecessary, uninvited and dangerous interference in an industry that has thrived in a free market just as Congress intended.

A. The Unambiguous Plain Meaning Of The Act Excludes Wireless Telecommunications Equipment.

The FCC's interpretation of the Act as to wireless equipment is analyzed under the familiar principles of *Chevron*, 467 U.S. 837. *See Whitman*, 121 S. Ct. 903. If the Act "resolves the question" of whether wireless equipment is covered, then "that is the end of the matter." *Id.* at 916 (quoting *Chevron*, 467 U.S. at 842-43). The Act does resolve the question, and the Court need go no further.

The Act begins with a plain language limitation of the FCC's jurisdiction that focuses specifically on wires. "The term 'utility' [*i.e.*, those required to provide access under the Act] means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any **wire communications**." 47 U.S.C. § 224(a)(1) (1994 & Supp. IV 1998) (emphasis added).[22] The Act's explicit focus on wires continues in its

[22] The 1996 amendments did not change the triggering requirement that a pole owner must use its poles for "wire communications" for the Act to apply. *Compare* 47 U.S.C. § 224 (1978), *with* 47 U.S.C. § 224 (1994 & Supp. IV 1998). As the Eleventh Circuit observed, that pole owners that do not use their poles for wire communications are excluded from the Act supports a narrow reading of the FCC's authority. *Gulf Power II*, 208 F.3d at 1274 n.24. The Federal Petitioners' interpretation would lead to an anomalous result. A pole owner that used a fraction of its poles for wire communications would subject its pole network to being saturated with wireless equipment. A pole owner that used every one of its poles for wireless communications could refuse access to all telecommunications equipment, whether wireless or wireline.

ratemaking standards, both for the cable service rate and telecommunications service rate, which are based on the "usable space" occupied by the attachment on a pole. 47 U.S.C. §§ 224(d) and (e) (2000). "Usable space" is defined as "the space above the minimum grade level which can be used for the attachment of **wires, cables, and associated equipment.**" *Id.* at § 224 (d)(2) (emphasis added).

It would make no sense for the Act to talk about attachments for which no usable space is defined, if only because there would be no way to apply the Act's ratemaking standards. Wireless communications equipment does not fit within the definition of "wires" or "cables," and neither the Federal Petitioners nor the Wireless Industry *Amici* argue that wireless equipment falls within the definition of "associated equipment." Congress did not amend the definition of "usable space" in 1996. Had Congress intended radically to alter the types of attachments allowed under the Act, Congress would have amended the long-standing phrase "wires, cables and associated equipment," for example by adding a reference to "wireless antennas, transmitters and other wireless transmission equipment." But no such amendment was made.

Instead of addressing this point, Petitioners simply argue that wireless carriers are "telecommunications carriers" and that wireless carriers sometimes use wires to connect their wireless transmission equipment to their customers or to their network or other networks. These arguments confuse the issue of who is entitled to make pole attachments with the

issue of what they are entitled to attach. The issue before this Court is the equipment to be attached, not the business in which its owner is engaged.[23] Regardless of whether wireless service providers are "telecommunications carriers" and regardless of whether they sometimes use wires and cables, the fact remains that their wireless transmission equipment, such as antennas and transmitters, is outside the scope of the Act.

The Act's narrow grant of jurisdiction to the FCC tracks the legislative history showing Congress' intent to grant jurisdiction over only a sliver of the space on poles owned by electric utilities, an industry and infrastructure not regulated by the FCC prior to the Act. Prior to the enactment of the Pole Attachments Act in 1978, the FCC had no jurisdiction to regulate pole attachments because the leasing of utility pole space "did not constitute communication by wire or radio." S. Rep. No. 95-580, at 14 (1978), *reprinted in* 1978 U.S.C.C.A.N. 109, 122. Congress gave the FCC jurisdiction over pole attachments and permitted "federal involvement in pole attachment matters . . . where space on a utility pole had been designated and was actually being used for communications service by wire or cable . . . . This expansion of FCC regulatory authority is strictly circumscribed and extends only so far as is necessary to permit the Commission to involve itself in arrangements affecting the provision of utility pole communications space to CATV systems." *Id.* at 15.[24]

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[23] As the Wireless *Amici* contend, they frequently use wires as part of their systems. Brief of Association for Local Telecommunications Services, et al., at 14. Therefore, the Congressional directive that "all" telecommunications carriers should have pole attachment rights can be effectuated, and this statutory language can be given meaning, without concluding that wireless transmission equipment is a permissible attachment.

[24] An early version of the Act gave the FCC jurisdiction over "any attachment for wire communication." H.R. Rep. No. 94-1630, at 2 (1976). The language was changed to narrow the Act's application to "any attachment by a cable television system" because the FCC was concerned that the earlier language would give it unintended and undesired overbroad jurisdiction. H.R. Rep. No. 94-1630, at 30-31.

The Federal Petitioners and *amici* make much of the "any attachment" language of 47 U.S.C. § 224(a)(4). Their argument is that the term "any attachment" by a provider of telecommunications service must be read expansively, so that "any" literally means "any and every," and thus encompasses wireless attachments or, presumably, anything else a provider chooses to attach. Respondents agree that a wireless communications carrier must be considered a "provider of telecommunications service," but to say "any attachment" should be given unlimited scope, without reference to the very specific context of "wires, cables and associated equipment" provided elsewhere in the Act, would lead to an absurd result. If Petitioners' out-of-context readings were correct, the Act would apply, and the FCC would have ratemaking jurisdiction over, literally every item attached to a pole by a telecommunications or cable provider. A cable company could attach a cable video monitor, advertising signage or lighting. If a telecommunications company lacked space in its office for a switch, splitter or a router, it could hang a cabinet on any utility pole to install the needed equipment. Indeed, if Petitioners' reading were correct, why couldn't any of the thousands of start-up telecommunications companies formed in response to the 1996 Act simply go into the outdoor advertising business using cheap access to utility poles in lieu of billboards? This cannot be what Congress meant; thus, the natural and contextual limit the Act places on the term "attachment" is that it be wires.

The Eleventh Circuit correctly held that when the provisions of the Act are read as a whole, the FCC has authority to regulate attachments for wire communications and, by negative implication, has no authority "over

attachments to poles for *wireless* communications." *Gulf Power II*, 208 F.3d at 1273-74.[25] The scheme of the Communications Act as a whole supports this conclusion. Where Congress desired to address the siting of wireless equipment, it did so specifically and unambiguously, such as carefully circumscribing the authority of state and local governments to regulate the placement of wireless equipment. *Id.* at 1275. *See also* 47 U.S.C. § 332 (1994 & Supp. IV 1998). If Congress intended to regulate the placement of wireless equipment in the Pole Attachments Act, it could and would have expressly done so.

The legislative history of the Pole Attachments Act reveals congressional policy that supports this plain language analysis. Congress enacted the Act in 1978 to prevent electric utilities from charging monopoly rents for attachment to their essential, or "bottleneck," facilities. *Gulf Power II*, 208 F.3d at 1274. Nothing in the legislative history suggests that Congress believed utility poles were bottleneck facilities for wireless equipment.[26] In fact, they are not. Wireless

[25] In discerning the meaning of statutory provisions, the Court has frequently drawn conclusions by negative implication. *See e.g., Director of Revenue of Missouri v. CoBank ACB*, 531 U.S. 316, 121 S. Ct. 941, 944 (Feb. 20, 2001) ("The structure of the Farm Credit Act indicates by negative implication that banks for cooperatives are not entitled to [implied tax] immunity.").

[26] Indeed, nothing in the legislative history of the 1996 Telecommunications Act suggests that Congress still believed utility poles were bottleneck facilities for wireline attachments. If they ever were—there has never been a factual or legal finding to that effect—it is no longer the case. Cable companies and wireline telecommunications providers have many alternatives to utility poles, including burial of cable and wires and the use of wireless and satellite signals transmitted from other structures. *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 15 F.C.C.R. 978, 983-84 (2000). Attachers simply do not want to pursue these alternatives because they will cost a bit more than the mandatory access they receive at regulated rates to utility poles. However, when

equipment can be, and is, placed on any tall structure, including buildings, towers, flagpoles and church steeples. And far fewer antennas, and thus poles, are needed to transmit wireless signals in a given area than wires and poles are needed to transmit wireline signals in the same area. There simply is no reason the Act should mandate access for wireless equipment to utility poles. *Id.* at 1275.

B. The FCC's Interpretation Is Unreasonable.

Although the Act unambiguously excludes wireless equipment from its ambit, to the extent that the Court finds the statute to be "silent or ambiguous" on the issue, it must proceed to *Chevron* step two and "defer to a 'reasonable interpretation made by'" the FCC. *Whitman*, 121 S. Ct. at 916 (quoting *Chevron*, 467 U.S. at 844). However, the FCC's interpretation of these provisions is unreasonable and would not be a proper subject of deference. As the Court's recent decisions indicate, it will not hesitate to vacate agency decisions which exploit gaps in statutes in a manner that is inconsistent with the statute's purpose, other applicable provisions or limits on the agency's authority. *Whitman*, 121 S. Ct. at 916; *Brown & Williamson*, 529 U.S. at 123; *Iowa Utilities*, 525 U.S. at 392; *MCI Telecommunications*, 512 U.S. at 228-31.

multimedia cable giant Charter Communications was unable to agree to a new pole attachment agreement with Georgia Power Company, it first indicated that it would instead bury its cables, but then built a "headend" station to transmit its cable signals through wireless signals. David Elmore, *Charter Commun-ications Offers Digital Cable*, MARIETTA DAILY J., Apr. 17, 2001. Charter was thus able to choose one of two options for obviating attachment to Georgia Power's poles.

In addition, as discussed *supra* at n.20, Congress has left huge holes in access to utility poles by excluding railroads, cooperatively organized electric utilities, and government owned electric utilities from the requirements of mandatory access. *See* 47 U.S.C. § 224(a)(1) (1994 & Supp. IV 1998). It is hard to believe Congress would have done this if it truly believed utility poles were "bottleneck facilities."

1. The FCC's Own Interpretations Of The Act Focus Exclusively On Wire Attachments.

Although the Pole Attachments Act, from 1978 until today, has always contained the "any attachment" language Petitioners now say applies to wireless equipment, the FCC has never previously interpreted the Act to apply to anything but wires. During the period when the "any attachment" language applied only to cable television systems—from 1978 to 1996—equipment "associated" with cable wires, such as the power boosters or amplifiers that cable operators routinely use to maintain cable signals over longer distances,[27] was routinely attached to poles but was never the subject of regulated rates. *Capital Cities Cable, Inc. v. Mountain States Tel. and Tel. Co.*, 56 Rad. Reg. (P&F) (1984). In addition, cable operators have neither demanded nor received regulated pole attachment rates for wireless equipment, despite the fact that cable operators have always made extensive use of wireless equipment. Neither the Government nor the Wireless *Amici* has cited any history of the FCC using the Act to regulate the attachment to utility poles of equipment other than wires.

The FCC's own interpretation of the Act—most recently confirmed on May 25, 2001—has acknowledged and incorporated the reality that the rate formulas set forth in the Act "do not account for the unusual requirements of wireless attachments" and wireless attachments must be dealt with on a "case-by-case basis." *1998 Report and* Order, 13 F.C.C.R. at 6879; *Consolidated Partial Reconsideration Order*, FCC

[27] Equipment that is "associated" with wires and cables would include passive equipment such as a splitters and connectors needed to join wires and cables together at connection points, *see Texas Cablevision Co. v. Southwestern Elec. Power Co.*, 1985 FCC LEXIS 3818 (Feb. 26, 1985), but not simply any piece of equipment that has a wire or cable attached to it.

01-170 at ¶¶ 43-45.[28] Indeed, the FCC's own rules, by which it promulgated the "cable rate" formula, only address wire attachments, and in fact presume that a wire attachment will be made in about one inch of the pole's communications space. *1979 Adoption of Rules for Pole Attachments*, 72 F.C.C. 2d at 79. In sum, the FCC has always interpreted "any attachment" not to apply to anything but a wire. As the Eleventh Circuit noted, the "FCC seemed to recognize that this might be the case when it stated that, "there are potential difficulties in applying the Commission's rules to wireless pole attachments." *Gulf Power II*, 208 F.3d at 1275 n.27 (quoting *1998 Report and Order*, 13 F.C.C.R at 6799).

Notwithstanding this long-standing interpretation and notwithstanding the inapplicability of the Act's ratemaking standards based on "usable space" to wireless attachments, the Commission responded to the 1996 amendments to the Act by claiming authority to make up on an *ad hoc* basis whatever wireless attachment rate formula it saw fit: "If the parties cannot modify or adjust the formula to deal with unique attachments, and the parties are unable to reach agreement through negotiations, the Commission will examine the issues on a case-by-case base." *Id. See also*

[28] The Commission admitted that wireless equipment involves, "more than a traditional box-like device and cable wires strung between poles." 13 F.C.C.R. at 6879. The Commission failed, however, to address the question of how such equipment would fit within the statutory reference to "wires, cables and associated equipment." 47 U.S.C. § 224(d)(2) (1994). The Commission simply parrots the statutory language, in its own Rules, 47 C.F.R. § 1.1402(c) (2000), which define "usable space" as the space that can be used for, "wires, cable (sic) and associated equipment," and in fact blindly applies this definition in the context of telecommunications carriers. The Commission failed to apply its expertise or provide a reasoned explanation as to how the wireless equipment it described could be considered, "associated equipment" within the meaning of the Act and its own rules and as a result the Commission's decision to assert jurisdiction over wireless equipment attachments is not entitled to deference.

Consolidated Partial Reconsideration Order, FCC 01-170 at ¶¶ 43-45. The Commission's problem is not in the difficulty of regulating "unique attachments"; rather, the Commission's problem is its own consistent acknowledgment that it has no basis—either statutory or practical—on which to exercise its purported jurisdiction.

2. Attachment Of Wireless Equipment Will Create Unintended and Undue Regulatory Inequities.

The Commission's expansion of the Act to encompass wireless equipment will create unwarranted regulatory inequities and is inconsistent with other Commission decisions and regulations that are closely related to the Act. First, attaching wireless equipment to utility poles may well subject them to regulation as antenna structures. "The term antenna structure includes the radiating and/or receive [sic] system, its supporting structures and any appurtenances mounted thereon." 47 C.F.R. § 17.2(a) (2000). Because the FCC deems the owner of the tower structure, and not the owner of the wireless equipment, to be responsible for filing and amending a proper antenna structure registration, pole owners may potentially be subject to fines of up to one million dollars for regulatory violations. *See* 47 U.S.C. §§ 503(b)(1)(B) and 503(b)(2)(b)(1994); *Streamlining the Commission's Antenna Structure Clearance Procedure and Revision of Part 17 of the Commission's Rules Concerning Construction, Marking and Lighting of Antenna Structures*, 15 F.C.C.R. 8676 (2000); 47 C.F.R. § 17 (2000). Pole owners *cum* wireless tower owners may also be required to navigate the maze of regulatory control over wireless equipment Congress has left to state and local governments. *See* 47 U.S.C. § 332(c) (1994 & Supp. IV 1998). Surely Congress could not have intended to add insult to injury, first forcing pole owners to accept wireless equipment, then forcing them to take responsibility for regulatory compliance.

3. The Wireless Industry Enjoys A Thriving Market And Neither Needs, Nor Was Intended To Receive, Congressional Largesse.

To date, the FCC has not engaged in any proceeding establishing rate regulation for attachment of wireless equipment, other than to say that the rates will be determined on an *ad hoc* basis when a dispute arises. *Consolidated Partial Reconsideration Order*, FCC 01-170 at ¶¶ 43-45. Owners of wireless equipment or utility poles have not sought the assistance of the FCC to establish any regulated rates. In short, the FCC has not exercised its self-proclaimed jurisdiction under the Act. The result is that the wireless industry has continued the dynamic growth it began long before the 1996 amendments to the Act.

In 1983, companies began to offer cellular phone service to the public, and in each year between 1983 and 1995, "cellular subscriber growth . . . approached or exceeded fifty percent," reaching a level of approximately twenty-five million users. *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 10 F.C.C.R. 8844, 8848 (1995). As of year-end 1999, mobile telephony, only one of three sectors of the wireless industry identified by the Commission, generated more than $40 billion dollars in revenue and served over 86 million subscribers, representing 32 percent of the country's population. *2000 CMRS* Report, 15 F.C.C.R. at 17664-68.

The Commission expects the healthy level of competition to fuel industry wide growth and product diversification. *Id.* at 17665. This is evidenced by recent mergers allowing wireless providers to operate on a nationwide scale. *Id.* at 17669-71. It is also evidenced by the advent and use of new technologies like digital over analog and PCS in conjunction with cellular. *Id.* at 17672-75. In fact, the Commission recognizes that the overlapping use of cellular and PCS

spectrum indicates that the industry plans "to expand capacity and/or offer additional services. *Id.* at 17675. Meanwhile, perhaps the most telling fact is that prices for mobile telephony service dropped more than 11 percent between 1999 and 2000. *Id.* at 17663-65.

Through all of this, as *Amici* Real Access Alliance and Site Operators and Managers Alliance of the Personal Communications Industry Association show, the market for wireless communications towers has thrived. The rental rates for wireless towers are far in excess of any proportionate rates that could be analogized under the FCC's formulas, yet towers have sprung up all around the country.

Although the Commission issues a report each year on the wireless industry and the factors underlying its growth, the Commission has not once identified the Pole Attachments Act as an impetus for the industry's successful expansion. *See 2000 CMRS Report*, 15 F.C.C.R. at 17668; *In the Matter of Implementation of Section 6002(b) of the Budget Reconciliation Act of 1993*, 13 F.C.C.R. 19746, 19756 (1998). Indeed, the Commission excluded Section 224 from a list of provisions in the 1996 Telecommunications Act that affected the wireless industry. *Id.* at 19756 ("The 1996 Act resulted in several proceedings that affect many CMRS operators: Interconnection, Universal Service, Number Portability, Forbearance, Biennial Review, and Customer Proprietary Information.").

The proof, as they say, is in the pudding. Congress did not intend for the FCC to regulate rates for attachment of wireless equipment and, without the FCC's application of the Act, the wireless industry has developed a dynamic market for its products, resulting in additional choice and lower prices for consumers as well as innovation and expansion by wireless providers.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES PUBLIC LAWS
95th Congress—Second Session
Convening January 19, 1978

PL 95-234 (HR 7442)
February 21, 1978

COMMUNICATIONS ACT AMENDMENTS OF 1978

An Act to amend the Communications Act of 1934 to provide for the regulation of utility pole attachments.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Communications Act Amendment of 1978".

* * *

Sec. 6. Title II of the Communications Act of 1934 is amended by adding at the end thereof the following new section:

"REGULATIONS OF POLE ATTACHMENTS

"Sec. 224. (a) As used in this section:

"(1) The term 'utility' means any person whose rates or charges are regulated by the Federal Government or a State and who owns or controls poles, ducts, conduits, or right-of-way used, in whole or in part, for wire communication. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government any State.

"(2) The term 'Federal Government' means the Government of the United States or any agency or instrumentality thereof.

"(3) The term ' State' means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

"(4) The term 'pole attachment' means any attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

"(b)(1) Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312(b) of title III of the Communications Act of 1934, as amended.

"(2) Within 180 days from the date of enactment of this section the Commission shall prescribe by rule regulations to carry out the provisions of this section.

"(c)(1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions for pole attachments in any case where such matters are regulated by a State.

"(2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that—

"(A) it regulates such rates, terms, and conditions; and

"(B) in so regulating such rates, terms and conditions, the State has the authority to consider and

does consider the interests of the subscribers of cable television services, as well as the interests of the consumers of the utility services.

"(d)(1) For purposes of subsection (b) of this section, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduct, or right-of-way.

"(2) As used in this subsection, the term 'usable space' means the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment.

"(e) Upon the expiration of the 5-year period that begins on the date of enactment of this Act the provisions of subsection (d) of this section shall cease to have any affect.".

Sec. 7. The amendments made by this Act shall take effect on the thirtieth day after the date of enactment of this Act; except that the provisions of sections 503(b) and 510 of the Communications Act of 1934, as in effect on such date of enactment, shall continue to constitute the applicable law with the respect to any act or omission which occurs prior to such thirtieth day.

Approved February 21, 1978.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 95-721 and 95-721, pt. 2 (Comm. on Interstate and Foreign Commerce).

SENATE REPORT No. 95-580 accompanying S. 1547 (Comm. on Commerce, Science, and Transportation).

CONGRESSIONAL RECORD:

Vol. 123 (1977): Oct. 25, considered and passed House.

Vol. 124 (1978): Jan. 31, considered and passed Senate, amended, in lieu of S. 1547.

Feb. 1, House concurred in Senate amendment, with amendments.

Feb. 6, Senate disagreed to House amendments Nos. 1, 2, and 3; concurred in amendment No. 4, with an amendment. House receded from amendments Nos. 1, 2, and 3; concurred in Senate amendment of No. 4.

Supreme Court, U.S.
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Nos. 00-832 and 00-843

In the Supreme Court of the United States

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
PETITIONER

v.

GULF POWER COMPANY, ET AL.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, PETITIONERS

v.

GULF POWER COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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In the Supreme Court of the United States

No. 00-832

NATIONAL CABLE TELEVISION ASSOCIATION, INC., PETITIONER

v.

GULF POWER COMPANY, ET AL.

No. 00-843

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

GULF POWER COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

I. SECTION 224 APPLIES TO ATTACHMENTS USED FOR DELIVERY OF COMMINGLED CABLE TELEVISION AND INTERNET SERVICE

A. The Plain Terms Of The Act Protect Wires Used To Provide Commingled Cable Television Service And Internet Access

1. The plain terms of the Pole Attachments Act authorize the FCC to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. 224(b) (1994). The Act also defines "pole attachment" to mean "any attachment by a cable television system * * * to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47

U.S.C. 224(a)(4).[1] Therefore, under the precise and unambiguous terms of the Act, if a wire is an "attachment by a cable television system," the FCC has authority "to provide" that the rates for the attachment are "just and reasonable." An item attached to a utility pole to provide commingled cable television programming and Internet access is an "attachment by a cable television system." Accordingly, the FCC has construed the Act to provide that it has authority to ensure that rates for such attachments are just and reasonable. The court of appeals' conclusion to the contrary is inconsistent with the most basic canons of statutory interpretation and with core principles of deference in administrative law.

2. Respondents do not dispute that a wire used to provide commingled cable television service and Internet access is an "attachment." Some respondents, however, assert that such attachments are not "by a cable television system." *E.g.*, Amer. Elec. Power. Br. 18-22; Atlantic City Elec. Co. Br. 23. They refer to the definition of the term "cable system" found at 47 U.S.C. 522(7). In 1996, Congress applied that definition, which originally applied only to Title VI of the Communications Act (which governs cable television), to the Communications Act as a whole, including the Pole Attachments Act. See 47 U.S.C. 153(7). The definition states that the term "cable system"

> does not include * * * a facility of a common carrier which is subject, in whole or in part, to the provisions of [Title II of the Communications Act], except that such facility shall be considered a cable system * * * to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services.

[1] All references to 47 U.S.C. in this brief refer to Supp. V 1999, unless otherwise indicated.

47 U.S.C. 522(7). Respondents argue that "most major cable companies are now common carriers subject, in part, to the provisions of Title II, through the delivery of residential and/or commercial telephone service over the cable company's fiber optic network." Amer. Elec. Power Br. 20. They conclude that cable television systems receive the protections of the Pole Attachments Act only "to the extent" that their facilities are "used in the transmission of video programming directly to subscribers" —and not insofar as their facilities are used to provide Internet access. *Id.* at 21.

Respondents' argument is not properly before this Court, because respondents did not advance it before the FCC (or, for that matter, in the court of appeals). In *Sims* v. *Apfel*, 530 U.S. 103, 107-108 (2000), this Court discussed the doctrine of "administrative issue exhaustion." Although finding the doctrine inapplicable in that case, the Court cited as an example of a scheme that does require such exhaustion a decision of the D.C. Circuit interpreting Section 405 of the Communications Act, 47 U.S.C. 405, "to require complainants, before coming to court, to give the FCC a 'fair opportunity' to pass on a legal or factual argument." *Washington Ass'n for Television & Children* v. *FCC*, 712 F.2d 677, 681-682 & n.6 (1983); accord *Cellular Phone Taskforce* v. *FCC*, 205 F.3d 82, 88-89 (2d Cir. 2000), cert. denied, 121 S. Ct. 758 (2001). Respondents did not give the FCC a "fair opportunity" to address their "legal or factual argument." Accordingly, respondents' argument is not properly before this Court.

Requiring respondents to make their argument to the FCC in the first instance is particularly important in this case. Respondents' argument depends on a number of issues of statutory construction, such as the meaning of the proviso in Subsection 522(7) that a cable company remains such "to the extent [it] is used in the transmission of video programming directly to subscribers." Moreover, it is inconsistent on its face with the provision of the Pole Attachments Act that

protects "any" attachment not only "by a cable television system," but also "by a * * * provider of telecommunications service"—which presumably describes a cable company when it acts as a common carrier. 47 U.S.C. 224(a)(4). The FCC should have the opportunity to address those issues in the first instance.

Furthermore, respondents' argument rests on the factual premise that "most"—but apparently not all—"major cable companies are now common carriers subject, in part, to the provisions of Title II [of the Communications Act]." The sole support advanced for that proposition (Amer. Elec. Power Br. 20) is a publication of petitioner National Cable and Telecommunications Association stating that "[a]t least nine of the nation's largest multiple system operators (MSOs) now offer residential and/or commercial phone service in more than 45 markets overall." See *ibid.* By its terms, that untested statement does not purport to specify the number or percentage of individual "cable television systems" operated by those or other firms that act as telecommunications carriers.[2] In short, the untested factual premise of respondents' argument could not possibly support the court of appeals' conclusion that *all* attachments used to provide commingled cable television and Internet access are outside the protections of the Pole Attachments Act.

[2] On page 1-C-1, the same document states that "the cable industry now comprises 10,466 separate systems." NCTA, *Cable Television Handbook* (2001), <*available at:* http://www.ncta.com/pdf_files/Handbook-Total.pdf>.

B. Subsections (d) And (e), Which Provide Parameters For Certain Pole Attachment Rates, Do Not Purport To—And Have Been Reasonably Construed By The FCC Not To—Limit The Types Of Attachments Protected By The Act

1. As we explain in our opening brief (at 22-25), Subsections (d) and (e) do not limit the types of attachments protected by the Act, but instead specify limits on rates applicable to certain classes of attachments: Subsection (d) addresses rates "for any pole attachment used by a cable television system solely to provide cable service," 47 U.S.C. 224(d)(3), and Subsection (e) addresses rates "for pole attachments used by telecommunications carriers to provide telecommunications services," 47 U.S.C. 224(e)(1). Respondents argue that those provisions impliedly limit the general authority to ensure just and reasonable rates for "any" pole attachment granted in Subsections (a) and (b) to the particular attachments specified in Subsections (d) and (e).

Respondents' reading gives no effect to the general ratemaking authority granted in Subsections (a) and (b). Indeed, the coverage of the Act would remain unchanged under respondents' theory if Congress had simply eliminated the general terms of Subsections (a) and (b) granting that authority. But Congress wrote the Act to give the FCC a broader authority, and respondents' attempt to read Subsections (a) and (b) out of the Act should be rejected. "[T]he more natural reading of the statute's text, which would give effect to all of its provisions, always prevails over a mere suggestion to disregard or ignore duly enacted law as legislative oversight." *United Food & Commercial Workers Union Local 751* v. *Brown Group, Inc.*, 517 U.S. 544, 550 (1996).

2. Respondents argue that the "more specific language in Sections 224(d)(3) and (e)(1) * * * expressly limits the FCC's ratemaking powers to attachments used solely to pro-

vide cable and telecommunications services." Atlantic City Elec. Br. 15-16. Nothing in those subsections, however, "expressly" or even impliedly limits Subsections (a) and (b) to any specific types of attachments. As our opening brief points out (at 17-18), Congress knew how to withdraw parts of the FCC's general ratemaking authority when it wanted to do so, as it did in Subsection (c), which governs cases in which a State has regulated pole attachments, and Subsection (a)(5), which governs attachments by incumbent local exchange carriers (ILECs).[3] Nothing in Subsections (d) and (e), however, can reasonably be read to withdraw the authority over "any" pole attachment granted in Subsections (a) and (b).

3. Respondents argue that "Congress cannot reasonably be assumed to have provided * * * highly detailed standards for * * * rates for cable and telecommunications attachments [in Section 224(d) and (e)], yet to have provided an entirely *unbounded* power to the Commission to set just and reasonable rates for *other* services (including Internet services)." Amer. Elec. Power Br. 14. There are two errors in respondent's argument. First, the FCC's power to set "just and reasonable" rates for "other services" is not at all "unbounded"; an important factor in determining whether a rate is "just and reasonable" under the Act (as the FCC clearly recognized in this case by adopting the Subsection (d) rate for commingled cable and Internet services) is the

[3] We explain in our opening brief (at 18) that Congress excluded attachments by ILECs from the Act's protections in part because it found that ILECs frequently owned or controlled poles themselves. Respondents state (Amer. Elec. Power Br. 4 n.3) without citation that "[t]he implication that [ILECs] own or control all of the poles they use to string their wires is untrue." What is significant, however, is that Congress itself, as shown by the committee report cited in our opening brief (at 18), has long shaped the Pole Attachments Act on the premise that ILECs frequently (not always) own or control the poles they use, and Congress had no reason to disrupt the longstanding arrangements by which electric utilities and ILECs each shared access to poles owned by the other.

relationship between it and the specific rates in Subsections (d) and (e). Second, what is at issue here is not pole attachments used exclusively for "other services," but pole attachments that are indisputably used at least in part "by a cable television system," 47 U.S.C. 224(a)(4), to provide cable television services. The FCC has not broadened the Act to include attachments for Internet access; it has reasonably construed the Act in accordance with its terms so as not to exclude the intended rate protection for attachments by cable television systems simply because they additionally provide commingled Internet access.

4. Respondents argue extensively that Internet access is neither a "cable service" nor a "telecommunications service" under the Communications Act and that the FCC erred in failing to rule on that question. See, *e.g.*, Amer. Elec. Power Br. 16-18, 22-28; Atlantic City Elec. Br. 24-30; TXU Elec. Br. 15-18. The question on which this Court granted certiorari, however, is whether the provisions of the Pole Attachments Act "apply to attachments by cable television systems that [are] simultaneously used to provide high-speed Internet access and conventional cable television programming." 121 S. Ct. 879. Because that question turns on the general terms of Subsections (a) and (b), it does not turn on the characterization of Internet access as "cable" or "telecommunications" service. If Internet access is either cable television service or telecommunications service, all parties apparently agree that it comes within the protection of the Act. If Internet access is neither cable television service nor telecommunications service, it still comes within the Act if it is provided over "any attachment by a cable television system or provider of telecommunications service." 47 U.S.C. 224(a)(4). Accordingly, for the reasons given in our opening brief (at 29-30), the characterization issue need not—and should not—be resolved to answer the question presented here. See also Amer. Elec. Power Br. 12 (characterization issue has "ramifications far beyond the world of pole attachments").

The FCC should be left to resolve that issue in the first instance as and when such resolution becomes necessary.

C. Respondents' Policy Arguments Are Contrary To The Policies Of The Act

1. Respondents argue that the FCC's decision to apply the Subsection (d)(3) rate to wires used to provide commingled cable television programming and Internet access has untoward policy implications. Even if that were true, it is for Congress—not the courts—to make any corrections it deems desirable in the Pole Attachments Act. In any event, respondents' policy arguments are not sound.

a. Respondents argue that the FCC's construction of the Act is wrong because "it is not reasonable to assume that Congress intended *sub silentio* to 'subsidize' the cable industry's provision of high-speed Internet service, while simultaneously excluding this 'subsidy' for their principal competitors," which are said to consist of telecommunications firms that provide high-speed Internet access by means of digital subscriber lines. Amer. Elec. Power. Br. 29-30.

Insofar as respondents' complaint arises from the FCC's choice of the Subsection (d) rate—rather than the Subsection (e) rate or some other rate—it is not properly before this Court. The court of appeals did not address the question whether the FCC's choice of a rate was valid; it held that the FCC had no jurisdiction over attachments used to provide commingled service at all. If this Court reverses the court of appeals, that court on remand could address any issues that respondents have preserved about the FCC's choice of rate.

In any event, respondents' argument is not well-taken. It is undisputed that the Act provides a potentially lower rate for attachments by cable television systems used to provide cable television service. It provides a potentially somewhat higher rate based on the number of attachers for attachments by competitive local exchange carriers (CLECs),

which are essentially new entrants into the local telephone market. See 47 U.S.C. 224(e). And it does not provide rate protection at all for incumbent local exchange carriers (ILECs). See 47 U.S.C. 224(a)(5). As written and as construed by the FCC, the Act provides that all three categories of providers—cable television systems, CLECs, and ILECs—continue to pay the same rates as before for pole attachments if and when they provide commingled Internet access. Thus, all three groups are on an equal competitive footing in providing Internet access. Under respondents' theory, however, cable systems—but not CLECs or ILECs—would face a potentially large increase in their pole attachment rates if they initiate Internet access. Accordingly, while the Act as written and construed by the FCC preserves competitive equality, respondents' argument would result in imposing a substantial competitive disadvantage on cable systems in comparison to other competitors in the market for Internet access. Or, to put the matter another way, respondents' theory would destroy competitive equality by increasing—perhaps forbiddingly—cable systems' marginal costs of providing commingled Internet access.

b. On a related point, we explain in our opening brief (at 20-21) that Congress's express statutory declarations of a federal policy to "encourage the deployment" of broadband capability "that remove barriers to infrastructure investment," 47 U.S.C. 157 note, and "to promote the continued development of the Internet," 47 U.S.C. 230(b)(1), support the FCC's construction of the Pole Attachments Act not to impose a penalty on cable television systems that provide commingled Internet access. Respondents argue (*e.g.*, Amer. Elec. Power. Br. 29) that another federal policy—"to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State

regulation," 47 U.S.C. 230(b)(2)—is also implicated in this case.

The provision cited by respondents addresses the market "for the Internet," and it therefore is most naturally read to address the market for provision of Internet services to consumers, not the market for products (such as pole attachments or, for that matter, telephone switching equipment or rights-of-way used by ILECs and CLECs) used by providers of Internet services to make their businesses viable.[4] Furthermore, the Act as written and construed by the FCC does preserve a "vibrant and competitive free market" for Internet services by protecting cable television systems that provide such services from the monopoly power that utilities would otherwise exercise over pole attachments. Finally, Section 230(b)(2) is a statement of policy that could not in any event override the unambiguous terms of specific laws, such as those of the Pole Attachments Act at issue here.

2. Respondents argue (*e.g.*, Atlantic City Elec. Br. 20) that there is a "requirement that the Act be construed narrowly" because it "effects a taking." In *FCC* v. *Florida Power Corp.*, 480 U.S. 245 (1987), this Court held that the

[4] Respondents cite (see, *e.g.*, Atlantic City Elec. Br. 32-33) three provisions of the Communications Act that impose restrictions on communication over the Internet in an effort to protect children—Sections 230, 231, and 271 of Title 47—and then claim that "Congress did not * * * subtly hide regulation of the Internet in historical definitions of other services." Congress of course directly addressed the Internet in those provisions because, unlike the Pole Attachments Act, they regulate communication over the Internet, regardless of how the Internet is accessed. Moreover, there is nothing "subtle" or "hid[den]" in the Pole Attachments Act's provisions protecting rates for "any" pole attachment "by a cable television system or provider of telecommunications service." 47 U.S.C. 224(a)(4). Indeed, it is respondents whose position presumes that Congress "subtly hid[]" partial *de*regulation (*i.e.*, deregulation as soon as the provider adds commingled Internet access) of rates for attachments by cable television systems in provisions of the Pole Attachments Act (Subsections (d) and (e)) that on their face do not withdraw any of the Act's protections.

pre-1996 Act did not effect a taking. The Eleventh Circuit has held that the Act now does effect a taking, see Pet. App. 17a-18a, but that court has not yet addressed the question whether its rate formulas provide for just compensation, *id.* at 19a. So long as just compensation is provided, the Act is not subject to constitutional objection. And if it ultimately were to turn out that just compensation is not provided, constitutional questions would arise about the validity of the Act's rate protections for all attachments by cable television systems and telecommunications providers—not just the subset of attachments at issue here that are used to provide commingled cable television programming and Internet access. In short, the Act in our view is not unconstitutional, no court has held it to be unconstitutional, and, in any event, the doctrine of constitutional doubt could not suffice to require interpreting it in contradiction to its plain language and the views of the agency entrusted with its implementation. See *National R.R. Passenger Corp.* v. *Boston & Me. Corp.*, 503 U.S. 407, 421-422 (1992) (following "the rule of judicial deference to an agency's statutory interpretation, even when the statute is one authorizing condemnation of private property").

II. SECTION 224 APPLIES TO ATTACHMENTS USED TO PROVIDE WIRELESS COMMUNICATIONS

A. All Parties Agree That The Act Protects At Least Some Attachments By Wireless Providers

We explain in our opening brief (at 34-35 & n.12) that wireless carriers frequently use wires to attach and connect their wireless facilities. Respondents now repudiate (American Elec. Power Br. 31) as "imprecise language" the court of appeals' statement that the Pole Attachments Act does not protect any attachments by wireless telecommunications providers—even wireline attachments used to connect to wireless facilities. See, *e.g.*, Pet. App. 25a ("[T]he act does not provide the FCC with authority to regulate

wireless carriers."). Respondents now uniformly agree that the court of appeals' statements cannot be taken at face value, and that "to the extent a wireless carrier seeks to attach a wireline facility to a utility pole, * * * the wireline attachment is subject to Section 224." Amer. Elec. Power Br. 31; Atlantic City Elec. Br. 40; TXU Elec. Br. 18; Florida Power & Light Br. 10-11. All parties therefore now agree that, insofar as the court of appeals excluded wireline facilities used by wireless telecommunications providers from the Act's protections, it erred.

B. The Act's Definition Of "Usable Space" Does Not Limit Its Protection For Attachments By Providers Of Wireless Telecommunications Services

Respondents argue that the rate formula in Subsection (e) for attachments by telecommunications providers requires the conclusion that "wireless *equipment* is not covered." Amer. Elec. Power Br. 31; see *id.* at 35. The Subsection (e) rate formula defines the rate for attachments by telecommunications providers partly in terms of the "usable space" on a pole. 47 U.S.C. 224(e)(2) and (3). The term "usable space" is not defined for purposes of Subsection (e). But the prior subsection—Subsection (d), which governs the rates for attachments by cable television systems and telecommunications providers until the FCC has promulgated new regulations (as it now has done)—provides that "[a]s used in this subsection, the term 'usable space' means the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment." 47 U.S.C. 224(d)(2) (1994). Respondents argue that, at least under the Section 224(d) definition of usable space, telecommunications providers "are entitled to a regulated rate for attachments of *wires, cables and associated equipment*," and they assert that it follows that "[w]ireless facilities are not covered." Amer. Elec. Power. Br. 35.

1. Section 224(d)(2) does not purport to limit the terms of Subsections (a) and (b) that unambiguously provide that wireless attachments are covered. Moreover, respondents' argument fails on its own terms, because the "usable space" definition on which respondents rely refers not merely to "wires," but also to "associated equipment." As the FCC explained, "associated equipment," even in the case of traditional wireline telecommunications providers, often includes "*a traditional box-like device* and cable wires strung between poles." Pet. App. 96a (emphasis added).[5] Thus, even under respondent's view, attachments of both "wires" and "associated equipment" consisting of "box-like device[s]" are protected by the Act—regardless of whether the purpose of the attachment is ultimately to provide wireline or wireless telecommunications.

2. If the Act protects wires and associated "box-like device[s]" of all telecommunications providers, then its protections extend well into the full range of attachments by wireless telecommunications providers. But respondents would require courts to distinguish other kinds of wireless equipment—presumably those that are not "box-like device[s]" or otherwise sufficiently similar to the attachments made by wireless telecommunications providers—whose attachment to poles would not be protected by the Act. Respondents nowhere offer any principled way to distinguish between wires and "box-like device[s]" that are protected by the Act and what they term "wireless equipment" that

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[5] The record before the FCC includes pictures and descriptions of various box-like devices typically attached to utility poles by cable and wireline telecommunications providers. See, *e.g.*, Exhibits to Joint Comments of the Electric Utilities Coalition, CS Dkt. No. 97-98 (filed June 27, 1997); Exhibits to Reply Comments of the Electric Utilities Coalition, CS Dkt. No. 97-98 (filed Aug. 11, 1997). See also Pet. App. 59a n. 5 (noting that FCC "considered the comments and reply comments filed in * * * CS Docket No. 97-98" in this proceeding). We have lodged copies of the cited comments and exhibits with the Court.

respondents claim to be unprotected. See, *e.g.*, American Elec. Power Br. 31. Indeed, while some wireless equipment of some providers may require "the Commission [to] examine the issues on a case-by-case basis," Pet. App. 96a, other modern wireless equipment may be very similar in size and shape to the equipment used to provide purely wireline cable and telecommunications service. The fact that attachment of some wireless equipment could present novel issues that the Commission will have to address is an insufficient basis for concluding that the Act excludes attachments for "wireless equipment."[6]

3. The Commission's straightforward interpretation of the Act avoids the fruitless task of attempting categorically to distinguish wires and "box-like device[s]" that are protected by the Act from those that are not. The general jurisdiction-granting provisions of the Act do not make any distinction between wireline and wireless equipment. See U.S. Br. 31. To be sure, difficulties may arise in applying the FCC's rules to some wireless pole attachments, just as they may arise in applying the rules to some wireline pole attachments. See Pet. App. 95a. Such difficulties, however, can be resolved in an orderly way under the Act. As the FCC explained, "[t]he statute, legislative policy, administrative authority, and current industry practices all make private negotiation the preferred means by which pole attachment arrangements are agreed upon between a utility pole owner and an attaching entity." *Id.* at 67a-68a (footnotes omitted). Although respondents contend that the FCC's rules are inadequate to deal with the regulation of wireless attachments, the Commission has stated that "[t]here is no clear indication that [the Commission's] rules cannot accommodate

[6] The Act does expressly permit pole owners to deny attachment rights "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." 47 U.S.C. 224(f)(2).

wireless attachers' use of poles when negotiations fail." *Id.* at 96a. The Commission's determination that its rules and presumptions are sufficient to accommodate most attachments to provide wireless service is entitled to respect. As the FCC has stated in a recent order reconsidering the rate formula for wireless and other attachments, "[w]e continue to believe it prudent to gain experience through case by case adjudication to determine whether additional guiding principles or presumptions are necessary or appropriate." *Consolidated Partial Order on Reconsideration*, FCC 01-170, para. 45 (May 25, 2001); see also Pet. App. 96a.

4. On a related point, respondents argue that "[t]he FCC's own interpretations of the Act focus exclusively on wire attachments." Atlantic City Elec. Br. 44 (capitalization altered). To facilitate private negotiations, the FCC has indeed adopted a series of presumptions that govern pole attachment rates, and those presumptions include "a *rebuttable* presumption of one foot as the amount of space a cable television attachment occupies." Pet. App. 80a (emphasis added).[7] Utilities certainly may challenge that presumption in cases where they can show that an attachment takes up more than one foot of usable space. The FCC's adoption of a one-foot presumption, especially in the face of the fact that a cable wire typically occupies less than an inch of space, see note 7, *supra*, suggests that the FCC was allowing for the attachment not only of a cable wire, but also for clearance

[7] Respondents incorrectly state that the FCC's rules "presume that a wire attachment will be made in about one *inch* of the pole's communications space." Atlantic City Elec. Br. 45 (emphasis added). While the FCC initially recognized that cable wires may have a diameter of less than one inch, it nonetheless presumptively assigned them a space of one foot. See *In re Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 72 F.C.C.2d 59, 69-70 & n.26 (1979); see also 47 C.F.R. 1.1418(b) ("The *presumptive* one foot of space occupied by attachment is applicable to both cable operators and telecommunications carriers.") (emphasis added).

around that wire and some "associated equipment."[8] In any event, the FCC's adoption of only a rebuttable—rather than conclusive—presumption that attachments take up one foot of usable space suggests that the FCC took account of the fact that some attachments protected by the Act may take up more space.

C. Respondents' Other Arguments Should Be Rejected

1. Respondents argue (*e.g.*, Amer. Elec. Power Br. 30 n.21) that Section 224 does not "mandate access for cable or telecommunications companies to hang anything at all, from advertising banners to clothes lines, on utility poles." See also Atlantic City Elec. Br. 41 ("a cable video monitor, advertising signage or lighting"). The FCC has not been asked to consider whether the Act protects attachments that are not directly used to provide cable television or telecommunications services. If that issue were to arise, however, the FCC surely could find that the Act does not apply to attachments that are not used directly to provide cable television or telecommunications service. Alternatively, the FCC could conclude that the "just and reasonable" rate for a clothesline or advertising banner, in light of the Act's purposes and structure, is the market rate for that item. The plain terms of the Act protecting attachments used to provide wireless and wireline telecommunications services

[8] Respondents argue that prior to 1996, "equipment 'associated' with cable wires, such as the power boosters or amplifiers that cable operators routinely use to maintain cable signals over longer distances, was routinely attached to poles but was never the subject of regulated rates." Atlantic City Elec. Br. 44 (footnote omitted). That is mistaken, as the case they cite for that proposition demonstrates. See *Capital Cities Cable, Inc.* v. *Mountain States Tel. & Tel. Co.*, 56 Rad. Reg. 2d (P&F) 393, at 403 para. 23 (1984) ("[T]he space deemed occupied by [a cable television system] includes not only the cable itself, *but also any other equipment normally required by the presence of [the cable television system].*") (emphasis added).

should not artificially be limited to address respondents' far-fetched examples.

2. Respondents argue (*e.g.*, Atlantic City Elec. Br. 46) that permitting pole attachment rights for facilities used for wireless telecommunications services could make utility poles subject to "regulation as antenna structures" and could subject their owners to certain registration requirements. Registration is required, however, only for antennas that are more than 200 feet high, 47 C.F.R. 17.7(a), or would intrude into the airspace in or near an airport in accordance with certain formulas, 47 C.F.R. 17.7(b), (c) and (d). Typical utility poles subject to the Pole Attachments Act are 37.5 feet high, see note 9, *infra*, and are unlikely to intrude into the airspace of an airport, regardless of whether they have wireless attachments. Accordingly, respondents' concerns are misplaced. In any event the Commission can certainly address any problems that arise from particular attachments if and when such problems develop.

3. Respondents make much of an asserted congressional desire to limit the FCC's jurisdiction when the Pole Attachments Act was first enacted in 1977. See, *e.g.*, Amer. Elec. Power Br. 32, 34-35. To a great extent, the cited statements of concern had to do with whether the FCC or state regulatory bodies should be regulating pole attachments. For example, although respondents (see *id.* at 32) rely on concerns expressed by the White House Office of Telecommunications Policy, that office ultimately concluded that the Act's provision that "FCC jurisdiction would not exist if the state regulatory authorities adopt any plan to regulate pole and conduit space * * * accommodates our concerns." H.R. Rep. No. 721, 95th Cong., 1st Sess. Pt. 2, at 12 (1977), *reprinted in* Amer. Elec. Power Br. App. 85a-86a.

In any event, it is certainly true that Congress originally limited the Act's protection to pole attachments by cable television systems, excluding all other attachments (including those by all telecommunications providers). See, *e.g.*,

Atlantic City Elec. Br. 40. It is equally true, however, that Congress extended the Act's protection in 1996 to "any attachment by a * * * provider of telecommunications service," 47 U.S.C. 224(a)(4), and at the same time added a definition of "telecommunications service" that—by using the phrase "regardless of the facilities used," 47 U.S.C. 153(46)—precluded any distinction between wireline and wireless services. In 1996, Congress was therefore clearly aware that it was protecting attachments used to provide wireless, as well as wireline, telecommunications services. Respondents do not adduce a scrap of legislative history to suggest that Congress at that time was concerned with "strictly circumscrib[ing]," Amer. Elec. Power Br. 1, the FCC's jurisdiction or otherwise limiting the Act's protection for "any" pole attachment, 47 U.S.C. 224(a)(4).

4. Respondents argue that Congress "deal[t] extensively with the siting of wireless equipment in [47 U.S.C. 332(c)(7)]," which was also part of the 1996 Telecommunications Act, and that the specificity of that provision indicates that Congress "did not intend that Section 224 provide the FCC authority to regulate the siting of wireless equipment." Amer. Elec. Power Br. 36, 38; see also Florida Power & Light Br. 22-24; Pet. App. 26a. Section 332 addresses "the authority of a State or local government * * * over decisions regarding the placement, construction, and modification of" wireless telephone facilities. 47 U.S.C. 332(c)(7)(A). It requires zoning boards and other instrumentalities of state and local government, *inter alia*, to act within a reasonable time on siting requests, to support any denial of a request with substantial evidence, and not to base siting decisions on environmental effects of radio frequency emissions.

Contrary to the inference that respondents seek to draw, Section 332(c)(7)(A) demonstrates that Congress knew how to distinguish between wireless and wireline facilities when it wanted to do so. In that provision, Congress addressed

local zoning problems that affected wireless (not wireline) service, and it accordingly limited the provision solely to wireless services. The terms of the Pole Attachments Act, however, have nothing to do with zoning problems and preclude any such distinction. To the contrary, they apply to "any" attachment by a telecommunications service provider, "regardless of the facilities used." 47 U.S.C. 153(46).

5. Finally, respondents state, without citation, that "[a] vibrant free market exists for wireless sites" and that the "market rate * * * varies widely, but typically is $1,500 to $2,000 per month." Amer. Elec. Power. Br. 41. Regardless of whether respondents' figures are accurate, they appear to apply at most to the market for that part of the wireless architecture that requires line-of-sight capability, substantial height, and precise geographical location. It is unclear whether or to what extent any substantial part of that market would be affected by the Pole Attachments Act, since utility poles may not be high enough or located appropriately for telecommunications providers' antennas.[9] What is clear is that much of the wireless architecture may well be dependent on pole attachments, and Congress intended to cover such attachments when it amended the Act in 1996.

In any event, Congress has determined in the Pole Attachments Act that telecommunications providers—whether wireless or wireline—are entitled to rate protection for pole attachments. Whether Congress's determination does or does not affect what respondents call a "vibrant" free market is beside the point. If respondents are dissatisfied with Congress's determinations, their remedy is not to seek a judicial revision of the plain terms of the Act but to return

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[9] Amici Site Owners and Managers Alliance state (at 22 n.13) that "[t]owers used for wireless attachments vary considerably in height, with the tallest exceeding 2000 feet above ground and the average tower reaching 200-250 feet above ground." By contrast, the FCC has determined that typical utility poles are 37.5 feet high. Pet. App. 80a; 47 C.F.R. 1.1418(b).

to Congress to seek new legislation. Moreover, respondents have not disputed the proposition (see U.S. Br. 27-31, 36) that this case should be resolved under *Chevron* standards. See, *e.g.*, Atlantic City Elec. Br. 38-39. The FCC has construed the Act in accordance with its terms to apply to "any" attachment—whether used to provide wireless or wireline services. In order to prevail, respondents must show that the FCC's interpretation is either "arbitrary or capricious in substance" or "manifestly contrary to the statute." *United States* v. *Mead Corp.*, 121 S. Ct. 2164, 2171 (2001). Their policy arguments that regulation may be unnecessary for some class of wireless attachments cannot satisfy that burden.

For the reasons given above and those in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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JULY 2001

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IN THE

Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, INC.,

Petitioner,

v.

GULF POWER COMPANY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner states that its name has changed to National Cable & Telecommunications Association, Inc. Petitioner has no parent corporations, and it has issued no publicly held stock.

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REPLY BRIEF OF PETITIONER NCTA

Respondents' briefs, like the decision below, are all premised on a fundamental error. Respondents never come to grips with the reality that both Section 224's terms and its underlying purposes establish a "facility-based" regulatory regime for cable attachments rather than a "service-based" one. The particular *rate* a utility may charge for access to its poles, ducts, conduits and rights-of-way may vary depending on the services an attachment will be used to provide. See 47 U.S.C. § 224(d), (e). However, the threshold question of whether that attachment is covered by Section 224 at all (the question at issue here) depends solely on whether it is a "pole attachment" – a term which includes "any attachment by a cable television system." *Id.* § 224(a)(4), (b)(1).

Congress made Section 224's coverage depend on the nature of the cable facility, rather than any specific service that facility might be used to provide, because Congress recognized that the same cable facilities simultaneously can carry a broad array of potential services – which over the years have included not only video programming but also data transmission, burglar alarm systems, FM radio, Internet access, and many others, and which in the future undoubtedly will include other services that cannot be predicted today. Section 224 has been applied to cable television systems' pole attachments because those systems, and therefore every service provided over them, depend upon a "physical, point-to-point connection" with cable subscribers. *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 627-28 (1994). Congress recognized that cable television systems require access to the bottleneck facilities owned by utilities and that without the protections conferred by Section 224 such access would be subject to monopoly rates, terms, and conditions that would impede the provision of affordable services to the public.

Respondents do not dispute that this "facility-based" standard was the settled state of the law prior to 1996, see

Texas Utils. Elec. Co. v. *FCC*, 997 F.2d 925 (D.C. Cir. 1993), and they point to nothing in the 1996 amendments that remotely could support the sea change in that law that the Eleventh Circuit erroneously established. Nor do respondents even attempt to explain why Congress would have sought to stifle further development by penalizing innovative cable operators that expand their services by withdrawing regulatory protections upon which they rely so heavily.

ARGUMENT

I. CONGRESS DID NOT INTEND TO PENALIZE CABLE TELEVISION SYSTEMS THAT EXPAND THEIR SERVICES TO INCLUDE HIGH-SPEED INTERNET ACCESS BY SUBJECTING THEM TO MONOPOLY RATES, TERMS, AND CONDITIONS FOR ACCESS TO ESSENTIAL BOTTLENECK FACILITIES.

Respondents never directly address NCTA's core showing that the plain language of Section 224 requires the FCC to ensure that the "rates, terms, and conditions" for "any attachment by a cable television system" are "just and reasonable." 47 U.S.C. § 224(a)(4), (b)(1). They instead advance a litany of arguments for why this language should not be interpreted to mean exactly what it says.

1. Contrary to respondents' arguments, the FCC's authority to regulate the "rates, terms, and conditions" of attachments by cable television systems used to provide Internet access is not claimed to lurk, by "inference[]," within the "nooks and crannies" of some "hidden" statutory "mousehole." Brief for Respondents Atlantic City Elec. Co. *et al.* ("Atlantic City Br.") 11, 14, 23 n.13. Rather, that broad grant of authority resides in plain view in subsections (b)(1) and (a)(4) of Section 224. Subsection (b) requires the FCC to ensure that the "rates, terms, and conditions" of "pole attachments" are "just and reasonable." 47 U.S.C. § 224(b)(1). Subsection (a)(4), in turn, defines "pole

attachment" to mean "*any* attachment by a cable television system." *Id.* § 224(a)(4) (emphasis added). That express and unqualified language, by its terms, extends to an attachment by a cable system that provides commingled video programming and Internet access services.

Respondents argue that this conclusion should be rejected because "the FCC's jurisdiction under Section 224 would have no limit" and thus cable operators could use regulated pole attachments to "provide an electric utility service," "mount light fixtures," or "hang advertising banners." Brief of Respondent TXU Elec. Co. ("TXU Br.") 10-11; see also Atlantic City Br. 9; Brief for Respondents American Elec. Power Serv. Corp. *et al.* ("Am. Elec. Br.") 12. That concern is unjustified because Section 224 applies not to attachments by the owner of a cable television system, but only to attachments of a "cable television system" itself. 47 U.S.C. § 224(a)(4). Congress has defined "cable system" as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming . . . ." 47 U.S.C. § 522(7); *id.* § 153(7) (same). That definition excludes "light fixtures," "advertising banners," electric utility lines and all other hypothetical attachments which are no part of a facility "designed to provide cable service." *Id.* § 522(7). That definition, however, does encompass attachments used to provide Internet access service along the same facilities used to distribute "video programming." *Id.*

Respondents argue, based on subsection (C) of Section 522(7), that the attachments at issue here are not part of a "cable television system." Am. Elec. Br. 18-22; Atlantic City Br. 23. They contend, in two steps, that (1) by virtue of their "delivery of residential and/or commercial telephone service," "most major cable companies" are "common carriers" that fall outside the definition of "cable system," and therefore (2) attachments by such cable operators also fall outside of

Section 224. Am. Elec. Br. 20; see also Atlantic City Br. 23. That argument was not raised before the FCC or the Eleventh Circuit, and, in any event, it founders at both steps.

First, respondents' claim that "most" cable operators fall outside the definition of "cable system" because they also provide telecommunications service should not be considered because it is based upon assertions that are outside the administrative record (and it is false, in any event, because most cable systems do not offer telecommunications service). Am. Elec. Br. 20. Further, this extra-record assertion regarding the common-carrier status of *most* cable operators, even if it were true, would not support the court of appeals' judgment that *all* cable operators who provide Internet access service fall outside Section 224. Second, even if these threshold problems could be ignored, respondents' legal argument fails at step two because if all cable operators fall outside the definition of "cable system" because they provide *telecommunications service*, then Section 224 still would apply to their attachments because they would be "provider[s] of telecommunications service." 47 U.S.C. § 224(a)(4).

In any event, respondents badly misapply Section 552(7)(C). Subsection (C) states that a "cable system" "does not include":

> a facility of a common carrier which is subject, in whole or in part, to the provisions of subchapter II of this chapter, except that such facility shall be considered a cable system . . . to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services . . . .

47 U.S.C. § 522(7)(C). Respondents argue that this means "[w]here cable companies are common carriers," the facilities they use to provide Internet access are not part of a "cable system." Am. Elec. Br. 21. That is wrong. Subsection (C) states that "the facility of a common carrier" will not be

treated as a "cable system" even if "designed to provide cable service which includes video programming" *unless* that facility is actually "*used* in the transmission of video programming." 47 U.S.C § 522(7)(C) (emphasis added). Thus, subsection (C) prevents a facility of a telecommunications carrier from being regulated as a "cable system" so long as it is not "used" to provide "video programming." *Id.* It does not, however, exempt a facility "designed" *and* "used" to provide "video programming" from being treated as a "cable system" simply because it also provides Internet access.

2. Respondents' invocation of various canons of statutory construction fares no better.

a. For example, NCTA has not sought to "decouple" subsection (b)(1) from the remainder of Section 224. Am. Elec. Br. 13. Read together, the four subsections of Section 224 identified by respondents confirm the FCC's reading of Section 224. Atlantic City Br. 17; TXU Br. 8; Am. Elec. 13. Subsection (b)(1) grants the FCC authority to ensure that the "rates, terms, and conditions" of "pole attachments" are "just and reasonable." 47 U.S.C. § 224(b)(1). Subsection (a)(4) defines "pole attachment" as "*any* attachment by a cable television system." *Id.* § 224(a)(4) (emphasis added). Subsections (d) and (e), in turn, dictate how the Commission should exercise the authority granted in subsection (b)(1) to ensure "just and reasonable" "*rates*" in two circumstances. Subsection (d) provides a mechanism for determining "just and reasonable rates," *id.* § 224(d)(1), (2), and states that this mechanism "shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service." *Id.* § 224(d)(3). Subsection (e) provides a separate mechanism for determining "just, reasonable, and nondiscriminatory rates" for "pole attachments used by telecommunications carriers to provide telecommunications services." *Id.* § 224(e)(1).

These provisions together guarantee that the pre-existing "rate" mechanism in subsection (d) will continue to apply to "pole attachment[s] used by a cable television system solely to provide cable service." *Id.* § 224(d)(3). Where, however, a cable system uses its attachments also to provide telecommunications service in competition with other telecommunications providers, it will be subject to the rate set forth in subsection (e). *Id.* § 224(e)(1); see also S. Conf. Rep. No. 104-230, at 206 (1996). For all other circumstances, Congress commanded the FCC to "prescribe by rule," as it has done here, "regulations to carry out the provisions of this section," *i.e.*, to ensure that the "rates, terms, and conditions" of "any attachment by a cable television system" are "just and reasonable." 47 U.S.C. § 224(b)(1), (b)(2), (a)(4).

b. Respondents argue that this reading fails to recognize that the "general" language granting the FCC regulatory authority in subsections (b)(1) and (a)(4) is negated by the "specific" language in subsections (d) and (e). See, *e.g.*, Atlantic City Br. 16-17; Am. Elec. Br. 14. In respondents' view, subsections (d) and (e) not only define how the FCC should ensure "just and reasonable" "rates" for pole attachments in the circumstances identified in those subsections, but they also repeal, by negative implication, the FCC's established authority over the "rates, *terms, and conditions*" of pole attachments in all other circumstances. See Atlantic City Br. 16-17 ("'Specific terms prevail over the general in the same or another statute which otherwise might be controlling.'") (quoting *Clifford F. MacEvoy Co.* v. *United States*, 322 U.S. 102, 107 (1944)); see also Am. Elec. Br. 13-14; TXU Br. 8-9. Neither the legal canon upon which they rely nor the language of subsections (d) and (e) can support the burden placed on them by respondents.

First, the rule that specific terms govern general ones has no relevance here because its application is predicated on a conflict such that the "specific statute" will not be "nullified by a general one." *Crawford Fitting Co.* v. *J.T. Gibbons,*

Inc., 482 U.S. 437, 445 (1987); see also *Warden* v. *Marrero*, 417 U.S. 653, 659 n.10 (1974) (rejecting reliance on canon where there was "no conflict"); *Great N. Ry. Co.* v. *United States*, 208 U.S. 452, 465-66 (1908) (same). To be sure, the "specific" language in subsections (d) and (e) defines "just and reasonable" "rates" for pole attachments in the circumstances identified in those subsections. As to other circumstances, about which Congress admittedly was aware, there can be no conflict between the general authority over "rates" reflected in subsection (b)(1) and the "specific" language in subsections (d) and (e) because the more "specific" provisions say nothing about what is a "just and reasonable" rate in those other circumstances. See *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 376 n.5 (1986) (rejecting argument that "'specific terms prevail over the general'" where general provision "addresses a different subject than [specific one]").[1]

Respondent TXU confirms that subsections (d) and (e) say nothing about other circumstances because it must rewrite Section 224 to achieve its desired result. According to TXU, "[t]he addition of the word 'solely' to [subsection (d)(3)] cannot be attributed to anything but a deliberate effort to limit subsection (d) rates *only* to attachments used for 'cable

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[1] Prior to 1996, the FCC and D.C. Circuit held that Section 224 applied to attachments in other circumstances. *See, e.g., Heritage Cablevision Assocs.* v. *Texas Utils. Elec. Co.*, 6 FCC Rcd. 7099, 7101 (¶ 12) (1991) (Section 224 applies "regardless of the type of service provided over the equipment attached to the poles"), *aff'd* 997 F.2d 925, 927 (D.C. Cir. 1993); *WB Cable Assocs.* v. *Florida Power & Light Co.*, 8 FCC Rcd. 383, 386 (¶ 21) (1993) (Section 224 applies to attachment used to provide security alarm services). Respondents agree that "Congress is presumed to have been aware of the FCC's and the D.C. Circuit's interpretation of the Act." Atlantic City Br. 19; see also TXU Br. 13 n.5 ("Congress is aware of previous judicial and administrative constructions when it amends a statute"). Indeed, they admit Congress was aware of the FCC's decision in *Heritage* and D.C. Circuit's decision affirming *Heritage*. Am. Elec. Br. 2; TXU Br. 9-10; Atlantic City Br. 19.

services.'" TXU Br. 13 (emphasis added). But subsection (d) does not limit its application "*only* to attachments used for 'cable services'"; rather, it guarantees that subsection (d) will apply to attachments "used by a cable television system solely to provide cable service." 47 U.S.C. § 224(d)(3).

c. Similarly, respondents never address that implied repeals of the sort they advocate are disfavored and must be "clear and manifest." NCTA Br. 36-39. That omission is telling because, although they pay lip service to the notion that a statute "must be interpreted as a harmonious whole," Atlantic City Br. 17, the well-settled presumption against implied repeals is designed "to give *harmonious effect* to all acts on a subject where reasonably possible." 1A N. Singer, *Sutherland Statutory Construction* § 23.10, at 353 (5th ed. 1991) (emphasis added).[2] Specifically, "[w]here the powers or directions under several acts are such as may well subsist together, an implication of repeal cannot be allowed." *Posadas* v. *National City Bank*, 296 U.S. 497, 504 (1936).

Nothing in the 1996 amendments to Section 224 supports the conclusion that Congress sought to limit the FCC's pre-existing authority over pole attachments. To the contrary, Congress expressly expanded the FCC's authority by extending Section 224 to pole attachments by a "provider of telecommunications" as well as a "cable television system. 47 U.S.C. § 224(a)(4). Moreover, Congress simply would not have repealed the FCC's pre-existing authority over the "rates, terms, and conditions" of pole attachments in the manner suggested by respondents – *i.e.*, by modifying one provision (subsection (d)) and adding another (subsection (e))

[2] Respondent TXU tersely insists that this rule should not apply here because "[w]hen Congress changes a law, courts must give effect to those changes." TXU Br. 12 n.3. But that is no response at all because the presumption against implied repeals necessarily involves the enactment of a new law – here, the 1996 amendments to Section 224 – and its purpose is to determine, in TXU's words, how to "give effect to those changes."

that deal solely with "rates" but say nothing about the Commission's authority over "terms, and conditions." See 47 U.S.C. § 224(b)(1).[3] That conclusion is inescapable in light of the "heavy burden of persuasion" that a party advocating such a repeal bears. *Amell* v. *United States*, 384 U.S. 158, 165-66 (1966).

d. Alternatively, respondents argue that "deregulating cable company attachments when cable companies enter the competitive marketplace for Internet access" was, perhaps, an "unanticipated consequence[]" of Congress' decision to "extend[] the 'cable system' definition (47 U.S.C. § 522(7)) to the entire Communications Act. 47 U.S.C. § (153(7))." Am. Elec. Br. 21-22; TXU Br. 12. As demonstrated above (*supra* at 3-5), that argument is wrong because an attachment used to provide commingled Internet access and video programming clearly falls within the definition of "cable system." See Am. Elec. Br. 9, 19. Moreover, the claim that Congress in 1996 would have thought that extending the definitions from the 1984 Cable Act to Section 224 was the way to repeal the FCC's established authority under Section 224 is frivolous because the FCC held in 1991 that the Cable Act of 1984, to the extent it was relevant, *supported* its conclusion that Section 224 applied to attachments by cable systems "regardless of the type of service provided over the equipment." *Heritage Cablevision Assocs.* v. *Texas Utils. Elec. Co.*, 6 FCC Rcd. 7099, 7101 (¶ 12) (1991), *aff'd*, 997 F.2d 925 (D.C. Cir. 1993).

Indeed, in *Heritage*, the FCC quoted the House Report accompanying the 1984 Cable Act, which explained:

[3] *See Adoption of Rules for the Regulation of Cable Television Pole Attachments*, 72 FCC2d 59, 74 (¶ 33) (1979) (Section 224 "vests" FCC "with the responsibility for regulating not only the rates but also the terms and conditions of CATV pole attachments"), *aff'd*, 655 F.2d 1254 (D.C. Cir. 1981); *see, e.g.*, *Texas Cable & Telecomms. Ass'n* v. *Entergy Servs., Inc.*, 14 FCC Rcd. 9138, 9144 (¶ 17) (1999) (engineering survey was unreasonable term or condition).

> "The term 'cable system' is not limited to a facility that provides only cable service which includes video programming. Quite the contrary, many cable systems provide a wide variety of cable services and other communications services as well."

Id. at 7104 (¶ 24) (quoting H.R. Rep. No. 98-934 at 44 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4681). Further, that 1984 House Report recognized that "many cable facilities, especially those built in recent years, have been constructed with the capability of providing 'two-way' services, such as transmission of voice and data traffic, and transactional services such as at-home shopping and banking." H.R. Rep. No. 98-934, at 27 (1984), *reprinted in* 1984 U.S.C.C.A.N. at 4664; see also note 1, *supra*.

Respondents' recognition that their interpretation rests on possible "unanticipated consequences" of Congress' 1996 amendments, Am. Elec. Br. 22, highlights their inability to provide a plausible rationale for why Congress would have established the statutory scheme they advocate. Under that scheme, a cable operator would be penalized – through the loss of regulatory protections necessary to ensure access to essential bottleneck facilities – when, through innovation and investment, it is able to provide new services to subscribers.

On this point, respondents acknowledge the "dramatic" growth of the services provided by cable operators and admit that Congress, "[i]n recognition of this growth, and the . . . potential for continued growth," "established a national policy" to encourage such development. Atlantic City Br. 2-3. Given these facts, Congress would not have – and did not – enact a statutory scheme designed to stifle further development by withdrawing essential regulatory protections if cable operators provide new and innovative services. Respondents' interpretation is all the more implausible where, as here, the "service" is Internet access for which Congress independently has adopted a policy to "promote . . . continued development." 47 U.S.C. § 230(b)(1).

Respondents have no explanation for the perverse incentives created by their strained reading of Section 224. Instead, they argue, ironically, that the plain meaning of Section 224 should be disregarded because it would be "odd" or "absurd" for Congress to have "constrained the FCC's authority to regulate the rates charged for pole attachments used to provide" cable service and telecommunications service "while requiring the FCC to regulate attachments used to provide other services, but leaving its discretion to do so unfettered." TXU Br. 11. But, allowing "consequences thought to be absurd" to justify a departure from plain meaning "so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter." *Crooks* v. *Harrelson*, 282 U.S. 55, 60 (1930). More recently, this rule has been described as a "narrow" one, applying only if "the plain language of the statute would lead to 'patently absurd consequences' that 'Congress could not *possibly* have intended.'" *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., joined by Rehnquist, C.J., and O'Connor, J., concurring in judgment) (internal citation omitted).

This "narrow" exception does not assist respondents because the statutory scheme, as reflected in the plain language of Section 224, is neither "odd" nor "absurd." That scheme protects the existing interests of cable television systems by guaranteeing that the rates that utilities charge them for pole attachments will remain the same if their attachments provide "solely cable service." 47 U.S.C. § 224(d)(3). It also protects the interests of telecommunications providers by creating a level playing field if a cable television system uses its attachments to provide telecommunications service. *Id.* § 224(e)(1). As for all other attachments by cable television systems – used to provide other existing services or services that may be developed in

the future – Congress was entirely justified in granting the Commission discretion to ensure that the "rates, terms, and conditions" would be "just and reasonable" as those services evolve. *Id.* § 224(b)(1). That was certainly not "absurd," particularly since the alternative would have been to strip regulatory protection from facilities used to provide video programming whenever, and merely because, those facilities also provide additional services.

e. Finally, respondents argue that Section 224 must be "construed narrowly" "so as to take as little private property as possible." Atlantic City Br. 20. That argument is meritless both legally and factually. In *United States* v. *Riverside Bayview Homes, Inc.*, this Court explained that the Takings Clause prohibits only uncompensated takings. 474 U.S. 121, 128 (1985). Thus, if "compensation is available for those whose property is in fact taken, the governmental action is not unconstitutional," and therefore the "adoption of a narrowing construction" is not necessary for "avoidance of a constitutional difficulty." *Id.*

Here, even assuming *arguendo* that Section 224 authorizes a taking (as it does not),[4] it also unambiguously ensures utilities "just and reasonable" compensation. 47 U.S.C. § 224(b)(1). Because there is no issue regarding "avoidance of a constitutional difficulty," there is no reason to adopt a narrowing construction "so as to take as little private property as possible." Atlantic City Br. 20. But even if there were, respondents' argument ignores that cable systems provide Internet access service over the *same* facilities they use to provide video programming. NCTA Pet. App. 63a (¶ 30). As a result, no additional property is "taken" when a cable

[4] *See Metropolitan Transp. Auth.* v. *ICC*, 792 F.2d 287, 297 (2d Cir. 1986) ("requiring one public utility to give another operative rights over its facilities, subject to an obligation to pay reasonable reimbursement, to deliver service to the public fits more into the regulatory rather than the taking mode as those terms have traditionally been applied").

system decides to provide Internet access as well as video programming. Simply put, respondents' construction does not narrow the "scope of the taking," and therefore can have no bearing on the analysis of Section 224.

3. Respondents' policy arguments provide no basis for departing from the plain language of the Section 224.

a. Respondents contend that allowing cable systems that provide Internet access over the same facilities used to provide video programming constitutes "regulation" of the "Internet." Atlantic City Br. 8, 12-13, 32-33; Am. Elec. Br. 29. They argue that such regulation is contrary to 47 U.S.C. § 230(b)(2), which provides that "It is the policy of the United States . . . (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." *Id.* This argument misconceives the character of regulation under Section 224.

Section 224 does not regulate the "Internet." It regulates "utilities" that own or control "poles, ducts, conduits, or rights-of-way." 47 U.S.C. § 224(a)(1), (a)(4). In contrast, Section 230(b)(2) is a policy statement that the Internet itself should remain free from Federal and State regulation. *Id.* § 230(b)(2). As a result, Section 230(b)(2) has no bearing on Section 224. Indeed, just as no one would seriously claim that Section 230(b)(2) prohibits the FCC from regulating the facilities of cable operators or telecommunications carriers merely because those facilities may be used to provide Internet access (as well as other services), so too is Section 230(b)(2) irrelevant to the FCC's authority to prevent utilities from demanding monopoly rents for access to the bottleneck facilities that cable operators use to provide Internet access.

b. Respondents' related argument that cable systems are seeking a "subsidy" that will give them an unfair economic advantage over similarly situated entities is baseless. See Am. Elec. Br. 29-30; Atlantic City Br. 10. There is no

"subsidy." Section 224 was enacted to prevent utilities from charging monopolistic rates and imposing unjust and unreasonable terms and conditions on cable systems that require access to these facilities so they can provide service to their customers. See *FCC* v. *Florida Power Corp.*, 480 U.S. 245, 247 (1987). Indeed, the rate adopted by the FCC is a cost-based rate, not a subsidized rate.

Further, the FCC's interpretation of Section 224 is eminently fair to the other entities whose interests respondents purportedly seek to protect – incumbent local exchange carriers, satellite-based ISPs, and facilities-based ISPs – and to whom section 224 does not apply. See Atlantic City Br. 34. First, incumbent local exchange carriers ("ILECs"), which are excluded from the benefits of Section 224, 47 U.S.C. § 224(a)(5), do not need access to telephone poles because those facilities are "usually owned by telephone and electric power utility companies, which often have entered into joint use or ownership agreements." S. Rep. No. 95-580, at 12 (1977). Indeed, no ILEC has joined the respondents' argument that Section 224 should not apply to cable operators because ILECs are excluded from its benefits.[5] Nor are satellite-based ISPs similarly situated to cable systems because, as respondents acknowledge, Atlantic City Br. 34, they have no need for access to poles. Finally, NCTA is unaware of *any* "facilities-based" ISP that is neither a cable system nor telecommunications provider. Respondents purport to identify only one (Earthlink), *id.*, but are mistaken because Earthlink "do[es] not have [its] own transmission facilities." Brief of Earthlink, Inc. as *Amicus Curiae* in Support of Neither Party ("Earthlink Br.") 2.

c. Respondents' final policy argument is based on the rate ultimately adopted by the FCC for attachments used by

[5] *See* Brief for the United States Telecom Ass'n *et al.* as *Amici Curiae* in Support of Reversal ("USTA Br.") 7 (arguing that high-speed Internet access provided by cable systems is protected by Section 224).

cable operators to provide Internet access service. See Atlantic City Br. 36-37; Am. Elec. 12. They argue that the FCC's adoption of the subsection (d) rate structure for attachments by cable systems used to provide Internet access "tilt[s] the scales in favor of multimedia cable companies at the expense of telecommunications carriers," because, respondents contend, the subsection (e) rate "is likely several times higher than the [subsection (d)] rate." Atlantic City Br. 36, 37.

The question presented here, however, is whether the FCC can regulate such attachments at all under Section 224, *not* whether the rate ultimately chosen by the FCC, once regulatory authority is established, was appropriate.[6] But even if the rate adopted by the FCC were relevant, respondents' position would create a far more serious "disparity," by subjecting cable systems that provide Internet access to unregulated monopolistic rates while allowing telecommunications providers that provide Internet access to receive regulated rates under subsection (e). See TXU Br. 14 n.6 (rejecting claim that "telecommunications carrier would lose its Section 224(e) attachment rights" by providing Internet access).

4. Finally, even if Section 224 could be viewed as ambiguous, respondents have failed to show that the FCC's interpretation does not warrant deference under *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).[7] TXU's argument that deference is inappropriate

[6] In any event, adoption of the subsection (d) rate is reasonable because, as the FCC explained, it is consistent with the goal of "encourag[ing] cable operators to make Internet services available to their customers," whereas, "specifying a higher rate might deter an operator from providing non-traditional services." NCTA Pet. App. 64a (¶ 32).

[7] The *Chevron* framework applies here because Congress ordered the FCC to implement Section 224 through regulations, 47 U.S.C. § 224(b)(2), and the Order at issue here is the result of notice-and-

because the FCC should have determined the regulatory character of Internet access service provided by a cable system before it determined whether these attachments receive a "regulated rate under Section 224" is nothing more than a disagreement with the FCC's analysis of Section 224. TXU Br. 15; Am. Elec. Br. 17. That disagreement provides no basis for denying deference to the FCC's conclusions.

The relevant inquiry is whether the FCC's analysis is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. In this case, the FCC has adopted, at a minimum, a permissible reading of Section 224 that recognizes that Congress did not withdraw regulatory protections from cable systems that expand their services to provide Internet access over the same lines used to provide video programming. That ruling is entitled to deference.[8]

II. EVEN IF THE COURT CONCLUDES THAT ATTACHMENTS ARE PROTECTED BY SECTION 224 ONLY IF THEY ARE USED TO PROVIDE "TELECOMMUNICATIONS SERVICE" OR EXCLUSIVELY "CABLE SERVICE," IT SHOULD ALLOW THE FCC TO DETERMINE WHETHER INTERNET ACCESS PROVIDED BY A CABLE TELEVISION SYSTEM IS A "CABLE SERVICE."

As we demonstrated previously, if the Court concludes that the court of appeals was correct in concluding that only attachments by cable systems used for telecommunications service or exclusively for "cable service" are covered by Section 224, its judgment still should be reversed to allow the

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comment rulemaking. *Cf. United States* v. *Mead Corp.*, 121 S. Ct. 2164, 2175 (2001).

[8] Respondents also are off-base in arguing that the FCC has unduly delayed in determining the character of Internet access provided by a cable system. *See* Am. Elec. Br. 27-28. Indeed, they acknowledge the FCC has initiated a proceeding to decide that issue. Atlantic City Br. 27.

FCC to determine, in the first instance, whether high-speed Internet access service provided by a cable system is a cable service. NCTA Br. 42-44. A remand would allow the FCC to assemble an adequate record so that it could consider the arguments that are necessary for it properly to exercise its judgment in this matter. *Id.* at 43-44.

Respondents too recognized that "[t]his is simply the wrong case for ruling on the regulatory status of the Internet" because that "determination should be made in the first instance by the policy-making branches of government, on the basis of a full and complete record, not by this Court." Brief in Opposition 15. Respondents warned that the Court should not "make this decision preemptively" and should "allow the question . . . to be addressed by the FCC in its ongoing rulemaking proceeding." *Id.* at 14-15. Indeed, respondents acknowledged that resolution of the issue of whether "Internet service" provided by a cable system is a "'cable service' or a 'telecommunications service' . . . presents ramifications for controversies well beyond the scope of this proceeding and with far greater and more pervasive implications than pole attachments." *Id.* at 13.[9]

Respondents now, however, ask the Court to ignore the pending FCC proceeding that will address this very issue, to deny the FCC an opportunity to determine this claim on remand, and to leapfrog – as did the court of appeals – the administrative process by ruling that a cable system that provides Internet access is providing neither a "cable service" nor a "telecommunications service." Atlantic City Br. 24-31; Am. Elec. Br. 22-28; TXU Br. 16-17. Respondents

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[9] The broad impact of such a ruling has resulted in a host of briefs by *amici* with other agendas. *E.g.*, Brief of *Amici Curiae* Consumers Union, *et al.*, in Support of Neither Party 3 (arguing that improper classification of cable Internet access may "endanger the free and open character of the Internet"); Earthlink Br. 2 ("how the statutory classification question is answered will determine . . . whether ISPs . . . will be able to purchase use of transmission facilities from cable operators").

acknowledge that "further clarification might arguably be needed . . . on the issue of cable modem service," but they insist that this case involves a "straightforward interpretation of unambiguous statutory definitions." Atlantic City Br. 31. But even a cursory examination of the conflicting arguments presented by respondents and *amici* confirms that the ultimate resolution of this issue would benefit from the FCC's analysis. See, *e.g.*, *Whitman* v. *American Trucking Ass'ns*, 121 S. Ct. 903, 919 (2001) (remanding issue "to the EPA to develop a reasonable interpretation").

First, respondents and *amici* are wrong when they contend that cable Internet access is not "cable service." See Atlantic City Br. 28; Am. Elec. Br. 22-25. "Cable service" is defined as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 522(6). The term "other programming service," in turn, "means information that a cable operator makes available to all subscribers generally." *Id.* § 522(14). Cable Internet access makes available to subscribers, generally, information with which the subscribers interact by selecting and then using it. Those services therefore are encompassed within this statutory definition, as the legislative history confirms. See H.R. Rep. 104-458, at 169 (1996) (current definition of "cable service" intended to "reflect the evolution of cable to include interactive services such as game channels and information services made available to subscribers by the cable operator as well as enhanced services").[10]

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[10] Respondents, relying on the Ninth Circuit's decision in *AT&T Corp.* v. *City of Portland*, 216 F.3d 871, 876 (2000), argue that "cable service" is limited to "'one-way'" transmission, whereas Internet service is "'interactive.'" Atlantic City Br. 28; *see* Am. Elec. Br. 23-24 (same). But that argument ignores that that the statutory definition expressly includes "subscriber interaction" that involves the "selection" or "use" of information provided by the cable system. 47 U.S.C. § 522(6)(B).

Finally, on the issue whether cable Internet access is a "telecommunications service," both NCTA and respondents agree that it is not. See Atlantic City Br. 29-30; Am. Elec. 25-28. The arguments of *amici* who contend that the court of appeals should be reversed because, in their view, Internet access provided by a cable service is a "telecommunications service" are not properly before the Court. See, *e.g.*, USTA Br. 16-24. First, "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 95 (1943). Here, the FCC did not base its ruling on the ground that Internet access provided by a cable system is a telecommunications service. See NCTA Pet. App. 62a-63a, 66-67a (¶¶ 30, 34). Moreover, although *amici* have purported to file on the side of petitioners, they are actually seeking to have the FCC's rules *vacated* because their argument would require the application of a different rate formula – the formula of Section 224(e) for attachments that include telecommunications services – than the one chosen by the FCC. The Court generally does not consider arguments by *amici* that have not been advanced by the parties, and that principle should particularly apply where, as here, *amici* are seeking *vacatur* of a portion of an agency order. *See*, *e.g.*, *United Parcel Serv., Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981) (declining to consider argument by an *amicus* "since it was not raised by either of the parties here or below"); *United States* v. *Dion*, 476 U.S. 734, 736 n.3, 746 (1986) (same).

In any event, *amici* are plainly wrong in contending that cable Internet access is a "telecommunications service." USTA Br. 16-25; Earthlink Br. 16-29. The FCC has concluded that Internet access is an "information service" and that "telecommunication services" and "information services" are "mutually exclusive." *Federal State Joint Bd. on*

Universal Serv., 13 FCC Rcd. 11501, 11520 (¶ 39) (1998) ("*Universal Serv. Report*"). An "information service" is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20). A "telecommunications service," by contrast, is "the offering of telecommunications for a fee directly to the public," *id.* § 153(46), and "telecommunications" is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). Thus, carriers provide "telecommunications services" when they offer customers a pure transmission path with which to send and receive the customers' own information, while information service providers (such as, for example, ISPs or LEXIS) do not offer that pure transmission path to their subscribers. As the FCC has explained, a firm that offers an information service "does not provide telecommunications; it is using telecommunications." *Universal Serv. Report*, 13 FCC Rcd. at 11521 (¶ 41).

CONCLUSION

For these reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, INC.,

Petitioner,

v.

GULF POWER COMPANY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF OF PETITIONER NCTA

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SUPPLEMENTAL BRIEF OF PETITIONER NCTA

Pursuant to Rule 25.5 of the Rules of this Court, Petitioner National Cable & Telecommunications Association, Inc. ("NCTA") submits this supplemental brief to alert the Court to the recent decision in *MediaOne Group, Inc.* v. *County of Henrico*, No. 00-1680 (4th Cir. July 11, 2001). In *MediaOne*, which is reproduced in the appendix to this brief, Supplemental Brief Appendix 1a-18a ("Supp. Br. App."), the Fourth Circuit addressed whether the County of Henrico violated federal law by requiring that MediaOne "open its broadband pipeline to unaffiliated ISPs [Internet Service Providers]" as a condition for approval of the transfer of control of MediaOne's cable franchise to AT&T Corp. *Id.* at 7a. The court held that the requirement that MediaOne "provide its 'cable modem platform (unbundled from the provision of content)' to 'any requesting Internet Service Provider'" was pre-empted because it violated 47 U.S.C. § 541(b)(3)(D), which limits the conditions that can be imposed on the transfer of a cable franchise. *Id.* at 12a.

In doing so, the Fourth Circuit rejected efforts by some parties to have the court "go further . . . and determine the specific regulatory classification of MediaOne's Road Runner Service," *i.e.*, a service which "combines the use of a cable modem platform with access to the Internet." Supp. Br. App. 14a, 12a. After noting the competing arguments of the parties and the potentially "significant regulatory consequences" of their conflicting proposals, the court explained (i) that "the issue of the proper regulatory classification of cable modem service . . . is complex and subject to considerable debate" and (ii) that the outcome of that debate "w[ould] have a marked effect on the provision of Internet services." *Id.* at 15a. Acknowledging that the FCC had "initiated a proceeding . . . to examine classification and open access issues," and that resolution of this issue was not necessary to affirm the district court's decision, the Fourth Circuit concluded that it was "content to leave these issues to the

expertise of the FCC." *Id.* at 15a-16a. It therefore did not address whether such a service is properly classified as a "cable service," a "telecommunications service," and/or an "information service." *Id.* at 16a.

The *MediaOne* decision is relevant to whether the Court, if it were to reject NCTA's reading of 47 U.S.C. § 224, should resolve the proper regulatory classification of Internet access provided over a cable television system or whether that determination should be left, in the first instance, "to the expertise of the FCC." Supp. Br. App. 16a; see also Brief of Petitioner NCTA 42-44. Further, the court's determination that "the issue of the proper regulatory classification of cable modem service . . . is complex and subject to considerable debate," Supp. Br. App. 15a, is relevant to this Court's assessment of respondents' claim that the classification issue involves nothing more than a "straightforward interpretation of unambiguous statutory definitions." Brief for Respondents Atlantic City Elec. Co. *et al.* 31.

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SUPPLEMENTAL APPENDIX

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 00-1680

MEDIAONE GROUP, INCORPORATED; MEDIAONE OF VIRGINIA, INCORPORATED; AT&T CORPORATION,
Plaintiffs-Appellees,

v.

COUNTY OF HENRICO, VIRGINIA,
Defendant,

BELL ATLANTIC CORPORATION; BELL ATLANTIC-VIRGINIA, INCORPORATED; BELL ATLANTIC INTERNET SOLUTIONS, INCORPORATED,
Intervenors/Defendants,

and

GTE INTELLIGENT NETWORK SERVICES, INCORPORATED, d/b/a GTE.net,
Intervenor-Appellant.

VIRGINIA CITIZENS CONSUMER COUNCIL; CONSUMER FEDERATION OF AMERICA; CENTER FOR MEDIA EDUCATION; DISTRICT OF COLUMBIA; CITY OF TACOMA, WASHINGTON; MONTGOMERY COUNTY, MARYLAND; U.S. CONFERENCE OF MAYORS; NATIONAL LEAGUE OF CITIES; NATIONAL ASSOCIATION OF COUNTIES; NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; VIRGINIA ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; TEXAS ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; MINNESOTA ASSOCIATION OF COMMUNITY TELECOMMUNICATIONS ADMINISTRATORS; OPENNET COALITION; HANDS OFF THE INTERNET; FEDERAL COMMUNICATIONS COMMISSION; NATIONAL CABLE TELEVISION ASSOCIATION;

VIRGINIA TELECOMMUNICATIONS ASSOCIATION; WEST VIRGINIA TELECOMMUNICATIONS ASSOCIATION; CABLE TELECOMMUNICATIONS ASSOCIATION OF MARYLAND, DELAWARE AND THE DISTRICT OF COLUMBIA, INCORPORATED; NORTH CAROLINA CABLE TELECOMMUNICATIONS ASSOCIATION; SOUTH CAROLINA TELEVISION ASSOCIATION, *Amici Curiae*.

No. 00-1709

MEDIAONE GROUP, INCORPORATED; AT&T CORPORATION; MEDIAONE OF VIRGINIA, INCORPORATED;
Plaintiffs-Appellees,

v.

COUNTY OF HENRICO, VIRGINIA,
Defendant,

GTE INTELLIGENT NETWORK SERVICES, INCORPORATED, d/b/a GTE.net,
Intervenor/Defendant,

and

BELL ATLANTIC CORPORATION; BELL ATLANTIC-VIRGINIA, INCORPORATED; BELL ATLANTIC INTERNET SOLUTIONS, INCORPORATED,
Intervenors-Appellants.

VIRGINIA CITIZENS CONSUMER COUNCIL; CONSUMER FEDERATION OF AMERICA; CENTER FOR MEDIA EDUCATION; CITY OF TACOMA, WASHINGTON; MONTGOMERY COUNTY, MARYLAND; DISTRICT OF COLUMBIA; U.S. CONFERENCE OF MAYORS; NATIONAL LEAGUE OF CITIES; NATIONAL ASSOCIATION OF COUNTIES; NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; VIRGINIA ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; TEXAS

ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; MINNESOTA ASSOCIATION OF COMMUNITY TELECOMMUNICATIONS ADMINISTRATORS; OPENNET COALITION; HANDS OFF THE INTERNET; FEDERAL COMMUNICATIONS COMMMISSION; NATIONAL CABLE TELEVISION ASSOCIATION; VIRGINIA TELECOMMUNICATIONS ASSOCIATION; WEST VIRGINIA TELECOMMUNICATIONS ASSOCIATION; CABLE TELECOMMUNICATIONS ASSOCIATION OF MARYLAND, DELAWARE AND THE DISTRICT OF COLUMBIA, INCORPORATED; NORTH CAROLINA CABLE TELECOMMUNICATIONS ASSOCIATION; SOUTH CAROLINA TELEVISION ASSOCIATION, *Amici Curiae*.

No. 00-1719

MEDIAONE GROUP, INCORPORATED; MEDIAONE OF VIRGINIA, INCORPORATED; AT&T CORPORATION,
Plaintiffs-Appellees,

v.

COUNTY OF HENRICO, VIRGINIA,
Defendant-Appellant,

and

GTE INTELLIGENT NETWORK SERVICES, INCORPORATED, d/b/a GTE.net; BELL ATLANTIC CORPORATION; BELL ATLANTIC-VIRGINIA, INCORPORATED; BELL ATLANTIC INTERNET SOLUTIONS, INCORPORATED,
Intervenors/Defendants.

VIRGINIA CITIZENS CONSUMER COUNCIL; CONSUMER FEDERATION OF AMERICA; CENTER FOR MEDIA EDUCATION; CITY OF TACOMA, WASHINGTON; MONTGOMERY COUNTY, MARYLAND; DISTRICT OF COLUMBIA; U.S. CONFERENCE OF MAYORS; NATIONAL LEAGUE OF CITIES; NATIONAL ASSOCIATION OF COUNTIES;

NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; VIRGINIA ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; TEXAS ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS; MINNESOTA ASSOCIATION OF COMMUNITY TELECOMMUNICATIONS ADMINISTRATORS; OPENNET COALITION; HANDS OFF THE INTERNET; FEDERAL COMMUNICATIONS COMMMISSION; NATIONAL CABLE TELEVISION ASSOCIATION; VIRGINIA TELECOMMUNICATIONS ASSOCIATION; WEST VIRGINIA TELECOMMUNICATIONS ASSOCIATION; CABLE TELECOMMUNICATIONS ASSOCIATION OF MARYLAND, DELAWARE AND THE DISTRICT OF COLUMBIA, INCORPORATED; NORTH CAROLINA CABLE TELECOMMUNICATIONS ASSOCIATION; SOUTH CAROLINA TELEVISION ASSOCIATION, *Amici Curiae*.

Appeals from the United States District Court
for the Eastern District of Virginia, at Richmond.
Richard L. Williams, Senior District Judge.
(CA-00-33-3)

Argued: Sept. 27, 2000
Decided: July 11, 2001

OPINION

Before WIDENER, WILKINS, and MICHAEL, *Circuit Judges*.

MICHAEL, *Circuit Judge*:

AT&T Corporation is still the largest long distance telephone company in the country, and this case is about its recent entry into the broadband telecommunications market

that provides high-speed access to the Internet. AT&T has acquired MediaOne Group, Inc. (MediaOne), which has a cable franchise in Henrico County, Virginia. In approving the transfer of control of the franchise, the Henrico County Board of Supervisors (the County) required MediaOne to provide any requesting Internet Service Provider (ISP) with access to its cable modem platform. AT&T and MediaOne sued the County in federal court, arguing that the open access provision was preempted by federal law (the Communications Act) and, in any event, violated state law. The district court agreed and granted summary judgment for AT&T and MediaOne. We affirm as follows. Under *Bell Atlantic Md., Inc. v. Prince George's County*, 212 F.3d 863 (4th Cir. 2000), we must consider the state law question first. However, because Virginia law does not provide an independent ground for disposition of the case, we proceed to the preemption question. Henrico County's open access provision violates the federal Communications Act, 47 U.S.C. § 541(b)(3)(D), by forcing MediaOne to provide its telecommunication facilities (its cable modem platform) to any ISP as a condition for the County's approval of the transfer of control of the franchise. Because the open access provision is inconsistent with the federal Communications Act, it is preempted and superceded.

I.

Most residential and small business consumers gain access to the Internet through slower narrowband technology, specifically, through the traditional dial-up telephone modem that is connected to copper lines. Broadband technology is beginning to provide many of these consumers with a high-speed alternative to Internet access, and analysts are forecasting substantial growth in the demand for broadband services. The most common forms of broadband technology are cable modem platforms and digital subscriber lines (DSLs). A broadband pipeline, like the basic telephone

infrastructure, serves as a conduit between an Internet user and an ISP, such as America Online, Juno, or Prodigy.

In 1998 and 1999 AT&T began a major effort to establish a foothold in broadband markets around the country. AT&T sought to enter these markets by acquiring existing cable television companies. One of its first acquisition targets was MediaOne, a large cable company with a franchise in Henrico County, Virginia. Like most cable operators, MediaOne provides traditional cable television service. However, the company has upgraded its cable systems, including the one in Henrico County, to include a cable modem platform that provides a high-speed link to the Internet. In connection with this upgrade MediaOne joined with others to form a company doing business as "Road Runner." Road Runner provides a "bundled" service that combines MediaOne's broadband pipeline (the cable modem platform) with the Internet services usually offered by an ISP. MediaOne customers who want Internet access over cable do not have the option of using just MediaOne's cable modem platform; rather, they must subscribe to Road Runner and take the Internet services it offers. Although Road Runner customers may subscribe to an ISP unaffiliated with MediaOne, most customers have no incentive to do that because the features offered by most outside ISPs are nearly identical to those offered by Road Runner. Instead of paying for a duplicative Internet service from an outside ISP, most MediaOne customers simply stick with the bundled service provided by Road Runner.

On May 6, 1999, AT&T and MediaOne entered into an agreement to merge. The merger, which has now been finalized, gives AT&T control of all of MediaOne's cable television systems, including the system that holds a franchise in Henrico County. In July 1999 AT&T and MediaOne applied to the County for formal approval of the transfer of control. The County gave its approval in an ordinance adopted in December 1999. The County's approval, however,

was conditioned on the requirement that "[n]o later than December 31, 2000, [MediaOne] shall provide any requesting Internet Service Provider (ISP) access to its cable modem platform (unbundled from the provision of content) on rates, terms, and conditions that are at least as favorable as those on which it provides such access to itself, to its affiliates, or to any other person." This open access condition would require MediaOne to open its broadband pipeline to unaffiliated ISPs. MediaOne customers would thus be able to access the Internet over MediaOne's cable modem platform without subscribing to the bundled Road Runner service.*

AT&T and MediaOne chafed under the open access condition mandated by Henrico County. They sued the County in federal court in the Eastern District of Virginia, seeking a declaratory judgment that the condition violates the First Amendment and the Commerce Clause, is preempted by federal law, and is void under Virginia law. AT&T and MediaOne also asked for an injunction against the enforcement of the condition. They moved promptly for summary judgment on the grounds that the open access requirement is preempted by the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), and is unenforceable under Virginia law. GTE Intelligent Network Services, Inc., Bell Atlantic Corp., Bell Atlantic Virginia,

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* In its order approving the transfer of control of MediaOne's federal licenses to AT&T, the Federal Communications Commission noted that MediaOne has "committed to open [its] cable modem platform to unaffiliated ISPs as soon as . . . its exclusive contract with Road Runner expires in December 2001." *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp. Transferee*, 15 F.C.C.R. 9816, ¶ 120 (2000). Specifically, MediaOne has agreed to negotiate, upon the expiration of its exclusive contract with Road Runner, mutually acceptable access agreements with unaffiliated ISPs. *See id.* ¶ 121.

Inc., and Bell Atlantic Internet Solutions, Inc. (collectively "Verizon") were allowed to intervene as defendants on the side of the County. Verizon, of course, offers a DSL service that competes with MediaOne's Road Runner service. The County and Verizon filed a cross-motion for summary judgment asserting that the open access condition was not preempted by federal law and that it was a valid exercise of the County's authority under Virginia law.

The district court granted AT&T and MediaOne's motion for summary judgment. *See MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712 (E.D. Va. 2000). The court concluded that the open access condition was preempted by several provisions of the Communications Act. First, it held that the condition violates 47 U.S.C. § 541(b)(3)(D) by requiring MediaOne to provide its telecommunications facilities "to any requesting ISP" as a condition for the County's approval of the transfer of control. *Id.* at 714. Second, the court held that the open access condition violates 47 U.S.C. § 544(e) because it would condition and restrict the use of MediaOne's transmission technology. *Id.* at 715. Third, after concluding that Road Runner is a "cable service," the court held that the open access condition is also barred by 47 U.S.C. §§ 541(c) and 544(f)(1). Because the condition would require MediaOne to provide all ISPs nondiscriminatory access to its cable modem platform, the court concluded that the County was attempting to regulate MediaOne as a "common carrier" in violation of § 541(c). *Id.* at 715-716. The court also held that the condition is contrary to § 544(f)(1)'s prohibition against "requirements regarding the provision or content of cable services." *Id.* at 716. Finally, the district court held that the open access requirement is void under Virginia law because nothing in the Virginia Code (as it relates to the regulation of cable systems) expressly or impliedly authorizes the County to impose such a condition.

The County and Verizon appeal the district court's order granting MediaOne and AT&T's motion for summary judgment. We review a summary judgment decision de novo. *See AT&T Communications of Va. v. Bell Atlantic-Va., Inc.*, 197 F.3d 663, 668 (4th Cir. 1999).

II.

This case boils down to two questions: (1) the federal constitutional question of whether the Communications Act preempts any power Henrico County has under the Virginia Code to enact an open access provision and (2) the state law question of whether the County has the authority under the Virginia Code to enact such a provision.

Recently, in *Bell Atlantic Md., Inc. v. Prince George's County*, 212 F.3d 863 (4th Cir. 2000), we observed that the question of "whether a federal statute preempts a state statute . . . is a constitutional question." *Id.* at 865. We went on to hold that when a court is faced with a constitutional question of federal preemption and a question of state law, the court should "decide only" the state law question if it provides an independent "ground upon which the case may be disposed of." *Id.* at 866 (quoting *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring)). This rule is based on the principle that "courts should avoid deciding constitutional questions unless they are essential to the disposition of a case." *Id.* at 865. To complete the point, we state the obvious: an independent state law ground is one that allows us to avoid deciding a constitutional question. *See id.* at 865 (noting that the federal statute at issue reserved to local governments "specific powers" that might provide grounds for deciding the case). In sum, according to *Bell Atlantic*, if a case with a constitutional question of preemption also presents an independent and dispositive question under state law, we should confine ourselves to the latter. We turn, then, to Virginia law to see whether it provides an independent ground for disposition of this case.

A Virginia county's authority under state law to license and regulate cable television operators is found in Va. Code Ann. § 15.2-2108 (the "cable statute"). The General Assembly's grant of regulatory authority to the county (or locality) under the cable statute is broad:

> Localities may by ordinance exercise all the regulatory powers over cable television systems granted by the Cable Television Consumer Protection and Competition Act of 1992 (P.L. 102-3085, 1992). These regulatory powers shall include the authority (i) to enforce customer service standards in accordance with the Act, (ii) to enforce more stringent standards as agreed upon by the cable television system operator through the terms of the franchise, and (iii) to regulate the rates for basic cable service in accordance with the Act.

Va. Code Ann. § 15.2-2108(F). A Virginia county must exercise this regulatory power in a way that prevents cable operators from taking unfair advantage of their franchises. Specifically, a county must regulate in a manner consistent "with the policy of the Commonwealth to provide for the adequate, economical, and efficient delivery of [cable] systems to the consuming public [and] to protect the public from excessive prices and unfair competition." *Id.* § 15.2-2108(E). Again, the Virginia cable statute confers broad authority on counties to regulate cable television systems, and there is no specific provision in the statute that prevents a county from enacting an open access ordinance. The Virginia statute does have a catchall provision that limits a county's authority to regulate cable operators: section 15.2-2108(E) of the Virginia Code prohibits any cable regulation or ordinance that is "inconsistent with either the laws of the Commonwealth or federal law." We have searched and have not found any Virginia statute or any decision of the courts of the Commonwealth that would prohibit the County's open access provision. The provision is thus not inconsistent with the laws

of the Commonwealth. Because the open access provision is not prohibited by either the Virginia cable statute or by other laws of the Commonwealth, we do not (thus far) have any independent state law ground that allows us to avoid the federal preemption question.

The Virginia cable statute does, of course, prohibit any cable regulation or ordinance that is "inconsistent . . . with federal law." Va. Code Ann. § 15.2-2108(E). This raises the question of whether Virginia law, by embracing federal law, provides an independent state law ground for decision, thereby requiring us to avoid the constitutional question of federal preemption under the rule of *Bell Atlantic Md., Inc. v. Prince George's County*, 212 F.3d 863 (4th Cir. 2000). If we were to decide this case under § 15.2-2108(E) of the Virginia cable statute, the question would be whether Henrico County's open access provision is "inconsistent . . . with federal law," that is, the Communications Act. This is the same question we would ask under a federal preemption analysis. *See* 47 U.S.C. § 556(c) ("[A]ny provision of law of any . . . franchising authority . . . which is inconsistent with [the Communications Act] shall be deemed to be preempted and superceded."). If we were to decide the state law question first, we would in effect be deciding the federal preemption question as well. Thus, the state law ground in this case is not independent because it does not allow us to "avoid deciding [the] constitutional question[ ]" of federal preemption. *Bell Atlantic*, 212 F.3d at 865. We are therefore free under *Bell Atlantic* to proceed to the question of federal preemption and determine whether Henrico County's open access provision "is inconsistent with" the Communications Act. *See* 47 U.S.C. § 556(c).

The district court held that the open access provision is inconsistent with 47 U.S.C. § 541(b)(3)(D) because it would require MediaOne to provide telecommunications facilities as a condition for approving transfer of control of MediaOne's

cable franchise to AT&T. *See MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712, 714 (E.D. Va. 2000). Section 541(b)(3)(D) says that "a franchising authority may not require a cable operator to provide any *telecommunications* service or *facilities*, other than institutional networks, as a condition of the initial grant of a franchise, franchise renewal, or a transfer of a franchise." 47 U.S.C. § 541(b)(3)(D) (emphasis added). The term "telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(43). Although the Communications Act does not define the word "facilities" as used in "telecommunications facilities," it is evident from the language of the statute that these facilities are the physical installations or infrastructure necessary for transmission.

MediaOne's Road Runner service combines the use of a cable modem platform with access to the Internet. Road Runner's cable modem platform, separated from its Internet service component, is a telecommunications facility because it is a pipeline for telecommunications, that is, for "the transmission . . . of information of the user's choosing, without change in the form or content." *Id.* § 153(43) (defining "telecommunications"). As a condition for approving the change in control of the MediaOne franchise, the County required MediaOne to provide its "cable modem platform (unbundled from the provision of content)" to "any requesting Internet Service Provider." The provision unbundles Road Runner's Internet access service from its cable modem platform and compels MediaOne to offer the platform to unaffiliated ISPs for use as a transmission pipeline for their services. The open access provision therefore requires MediaOne to provide "telecommunications . . . facilities . . . as a condition of . . . a transfer of a franchise" in violation of § 541(b)(3)(D).

The County and Verizon argue that even if the cable modem platform is a telecommunications facility, § 541(b)(3)(D) still does not outlaw the open access provision. Section 541(b)(3)(D), they say, only prohibits localities from requiring cable operators to construct new telecommunications facilities, and the provision here does not impose any such requirement. That argument ignores the statute's plain language. Again, § 541(b)(3)(D) declares that franchising authorities may not require cable operators "to provide any telecommunications . . . facilities" as a condition to the transfer of a franchise. The section does not limit itself to new construction. Rather, it bars any condition that requires a cable operator to provide telecommunications facilities regardless of whether the facilities are in existence or must be built.

The County makes a separate argument that MediaOne's facilities qualify as a "cable system" that cannot be said to include any telecommunications facilities. Under the Communications Act a cable system is defined as "a facility . . . that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community." 47 U.S.C. § 522(7). The County points out that MediaOne offers traditional "cable services," like video programming, over its facilities. It therefore asserts that because its system is "*designed* to provide cable service" it cannot be considered a telecommunications facility. According to the County, providing Internet access over its cable system does not magically transform the cable system into a telecommunications facility.

We disagree with the County. The Communications Act recognizes that some facilities can be used to provide more than one type of service. The Act therefore contemplates that multi-purpose facilities will receive different regulatory classification and treatment depending on the service they are

providing at a given time. For example, under 47 U.S.C. § 522(7)(C) the definition of "cable system" does not include a facility of a common carrier that offers telecommunications services "except that such facility shall be considered a cable system . . . to the extent that such facility is used in the transmission of video programing directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services." In addition, under 47 U.S.C. § 153(46) the term "telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public . . . *regardless of the facilities used*." (emphasis added). Therefore, although MediaOne maintains a "cable *system*," its facilities can be properly classified as telecommunications facilities when they provide a transmission path to the Internet.

Because the open access condition violates § 541(b)(3)(D) of the Communications Act, our analysis of federal law may stop at that. Some of the parties want us to go further, however, and determine the specific regulatory classification of MediaOne's Road Runner service. The County argues that Road Runner is a "cable *service*" under the Communications Act. *See* 47 U.S.C. § 522(6) (defining the term "cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service"). It is very much in the County's interest to have Road Runner classified as a cable service. This would allow the County to regulate a cable operator's provision of Internet access over cable lines. *See* 47 U.S.C. §§ 541-49 (authorizing localities to establish and enforce requirements for cable facilities, equipment, and customer service). Verizon, on the other hand, urges us to hold that the Road Runner service is a "telecommunications service." 47 U.S.C. § 153(46) (defining the term "telecommunications service" as "the offering of telecommunications for a fee

directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used"). Verizon has an incentive to make this argument. Any determination that Road Runner is a "telecommunications service" could have significant regulatory consequences. Certain federal common carrier obligations could arise, *see, e.g.*, 47 U.S.C. §§ 201(b), 251, and all providers of "interstate telecommunications services" must contribute to the universal service fund supporting affordable telephone service, *see* 47 U.S.C. §§ 153(44), 202, 254. At bottom, Verizon seeks regulatory parity because its DSL service is already regulated as a telecommunications service. *See, e.g., In re Deployment of Wireline Servs. Offering, Advanced Telecommunications Capability*, 15 F.C.C.R. 385, ¶ 9 (1999). Finally, although no one makes the argument here, Road Runner might even be considered an "information service" under the Communications Act. *See* 47 U.S.C. § 153(20) (defining "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications"). If Road Runner is classified as an information service, it would not be subject to local franchising or common carrier regulation. *See* Federal-State Joint Bd. on Universal Serv., Report, 13 F.C.C.R. 11,501, ¶ 39 (1998).

As the preceding paragraph illustrates, the issue of the proper regulatory classification of cable modem service, such as Road Runner, is complex and subject to considerable debate. The outcome will have a marked effect on the provision of Internet services. The FCC, in its amicus brief, has diplomatically reminded us that it has jurisdiction over all interstate communications services, including high-speed broadband services. The FCC also advises us that it has initiated a proceeding, through a notice of inquiry, to examine classification and open access issues. *See* Inquiry Concerning High-Speed Access to the Internet Over Cable and Other

Facilities, 65 Fed. Reg. 60,441 (2000). The FCC's notice seeks comment on whether cable modem technology should be classified as a cable service, a telecommunications service, or an information service, and it also seeks comment on the implications of adopting any particular classification. *See* In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, No. 00-355, 2000 WL 1434689, ¶ 15 (Sept. 28, 2000). In addition, the notice indicates that the FCC is interested in determining whether open access to cable modem platforms is necessary to further the "goals of promoting competition, deregulation, innovation, and the deployment of high-speed services." *Id.* ¶ 32. Of course, the merits of open access are not before us. And, as we have already indicated, we do not have to reach the question of whether MediaOne's bundled Road Runner service is a cable service, a telecommunications service, or an information service. For the time being, therefore, we are content to leave these issues to the expertise of the FCC.

We simply hold that Henrico County violated § 541(b)(3)(D) when it conditioned the transfer of control of MediaOne's cable franchise by requiring MediaOne to unbundle its Road Runner service and provide open access to its telecommunications facilities, that is, its cable modem platform. Because the open access provision is inconsistent with the federal Communications Act, it is preempted. We therefore affirm the judgment of the district court.

AFFIRMED.

WIDENER, *Circuit Judge*, concurring:

I concur in the result. I arrive at that result, however, by a different route from that of the majority.

In this case, Henrico County, by ordinance, required open access to its cable modem platform, which requirement is in violation of the Federal Communications Act, 47 U.S.C. § 541(b)(3)(D), slip op. at 8.

A Virginia statute, Virginia Code § 15.2-2108(E) (1998), provides, in pertinent part, that "[n]o locality may regulate cable television systems by regulations inconsistent with either laws of the Commonwealth *or federal law relating to cable television operations*." (italics added)

Thus, Virginia has tried, as best as she may, even by specific statute, to prevent her counties from running afoul of the Federal Communications Act.

The determination of whether or not a local law has been preempted by federal law is a Constitutional question. It "is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the Constitutional question of whether they are in conflict." *Chicago & NWTR Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (internal quotations omitted).

In Virginia, a county has only the powers expressly granted to it by the Commonwealth, or necessarily implied, and a local ordinance in violation thereof is invalid. *Bd. of Supervisors of Augusta County v. Countryside Inv. Co.*, 522 S.E.2d 610, 613 (Va. 1999).

The second rule of construction in *Ashwander v. TVA*, 297 U.S. 288, 346-47 (Brandeis, J., concurring) (1936), is: "The court will not anticipate a question of Constitutional law in advance of the necessity of deciding it . . . . It is not the habit of the Court to decide questions of a Constitutional nature unless absolutely necessary to a decision of the case."

(internal quotations omitted) And the fourth rule of *Ashwander* is: "The Court will not pass upon a Constitutional question, although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Ashwander*, 297 U.S. at 346-47. I suggest the majority decision violates both these rules.

In my opinion, the Henrico County ordinance is in violation of state law, being "inconsistent with . . . federal law" under Virginia Code § 15.2-2108(E). Thus, our decision should rest on the fact that the Henrico County ordinance is contrary to state law, that ground having presented itself, instead of, contrary to *Ashwander*, deciding a Constitutional question which gets the same result.

What purpose is served by States trying to cooperate, as here, if their statutes are to be routinely Constitutionally preempted?

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On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF EARTHLINK, INC. AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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BRIEF OF EARTHLINK, INC. AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

INTEREST OF *AMICUS* EARTHLINK, INC.[1]

EarthLink, Inc. ("EarthLink"), having obtained the written consent of the parties pursuant to Rule 37.3 of the Rules of this Court,[2] submits this brief as *amicus curiae*. EarthLink is the second largest Internet service provider ("ISP") in the nation. EarthLink is the largest ISP that is not controlled by or under common ownership with a cable television company. The first question on which certiorari was granted—the scope of the authority of the Federal Communications Commission ("FCC" or "Commission") under section 224 of the

[1] In accordance with the Court's Rule 37.6, EarthLink and its counsel certify that no counsel for a party authored this brief in whole or in part and that no person or entity other than EarthLink made any monetary contribution to the preparation or submission of this brief.

[2] The consents have been filed with the Clerk with this brief.

Communications Act of 1934[3] to regulate the rates for pole attachments made by cable companies that offer Internet access service—is of critical interest to EarthLink for two reasons.

First, to the extent that EarthLink is able to purchase from cable companies transmission services that EarthLink may use to deliver its Internet access services to consumers, the price that EarthLink will pay for such transmission will depend in part on how much a cable company may have to pay to a utility to attach its cables to the utility's poles. Second, and ultimately of much greater consequence, the proper application of section 224 to pole attachments used by cable companies to deliver Internet access services to consumers will require that the Court decide whether such attachments are used in the provision of "cable service" or "telecommunications service."

Because the statutory definitions that control that decision apply to the entire Communications Act, not just section 224, how the statutory classification question is answered will determine not only the applicable rate for pole attachments, but also whether ISPs such as EarthLink, which do not have their own transmission facilities, will be able to purchase use of transmission facilities from cable operators. The reason that access to transmission services is implicated by the

[3] The Communications Act of 1934 is codified generally at 47 U.S.C. §§ 151 *et seq*. There are numerous references in the record to the "Pole Attachments Act." Section 224 (Regulation of Pole Attachments) was added to the Communications Act of 1934 by section 6 of the Communications Act Amendments of 1978, P.L. 95-234, 92 Stat. 35, which also amended other parts of the Communications Act. Accordingly, there is no "Pole Attachments Act," and when EarthLink speaks of the "Act" or the "Communications Act," it means the Communications Act of 1934, as amended. The point is not purely semantic, because the statutory terms discussed in the analysis below apply to the entire Act, not just section 224. *See* 47 U.S.C. § 153 ("For the purposes of this Act, unless the context otherwise requires – . . . .").

court's resolution of the statutory classification issue is that providers of telecommunications services are required under sections 201 and 202 of the Communications Act to sell their telecommunications services on nondiscriminatory terms to all qualified buyers.[4] 47 U.S.C. §§ 201, 202. Providers of cable services are not subject to the same obligation. 47 U.S.C. § 541(c).

SUMMARY OF ARGUMENT

Petitioners FCC and the National Cable Television Association, Inc. ("NCTA") have presented the issue of the Commission's authority to regulate pole attachments for

[4] As the power utility parties note in their Brief in Opposition to the petitions for certiorari, the FCC has requested and received comments on the question of whether transmission services used by cable companies to provide Internet access constitute "telecommunications services." *See* Appendix to Brief In Opposition (FCC *Notice of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185 (2000)). The Commission has issued no order in that docket. The issue of ISP access to cable transmission services has also been raised in earlier Commission proceedings, but the Commission has refused to address it. *See, e.g., In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T Corp.*, Memorandum Opinion and Order, 15 F.C.C.R. 9816, 9872 (2000) ("[T]he Commission has not determined whether Internet access via cable system facilities should be classified as a "cable service" subject to Title VI of the Act, or as a "telecommunications" or "information service" subject to Title II. There may well come a time when it will be necessary and useful from a policy perspective for the Commission to make these legal determinations."). *See also In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc. to AT&T Corp.*, Memorandum and Order, 14 F.C.C.R. 3160, 3201, 3207 (1999). The fact that the Commission has had squarely presented to it the issue of the proper classification of cable-based transmission services used to deliver Internet access but has consciously declined to address it makes somewhat hollow the Commission's request that the Court remand that issue to the Commission if the Court disagrees with the outcome below. *See* Commission Reply To Brief In Opposition at 5.

cable facilities used to transmit Internet access services as one that turns on a plain reading of sections 224(a)(4) and 224(b)(1). *See, e.g.*, Commission Petition at 12. The electric utility respondents, on the other hand, contend that resolution of the first issue upon which certiorari was granted requires that the Court decide whether pole attachments used for cable facilities over which Internet access services are transmitted are used to provide "cable service" or "telecommunications service." Brief in Opposition at 7. EarthLink agrees with respondents that determining whether the Commission has properly applied its pole attachment authority under section 224 requires that the Court determine the statutory classification of the services for which the pole attachments are used.

A straightforward application of the plain language of the Act and uncontested and longstanding Commission precedent demonstrates that the pole attachments at issue are used to provide telecommunications service when they are used to deliver Internet access service to the public.[5] This is so because Internet access service is itself an "information service," which the Act states by definition is provided "via telecommunications."[6] 47 U.S.C. § 153(20). When "tele-

[5] In its February 5, 2001, Motion for Leave to Dispense With Preparation of a Joint Appendix, the Commission stated that: "The questions presented are questions of law." *Id.* at 1. EarthLink agrees. EarthLink also believes that those questions may be resolved by a plain reading of the Act, and accordingly that there are no statutory ambiguities with respect to which the Court owes any deference to the Commission's interpretation. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

[6] The appeals court properly noted that Internet access service is itself an "information service." *Gulf Power Co. v. F.C.C.*, 208 F.3d 1263, 1277 (11th Cir. 2000); Appendix To Commission's Petition for Writ of Certiorari at 30a (hereinafter "Commission Appendix"). As discussed further below, however, the court's failure to recognize that every

communications" is offered to the public for a fee, it is a "telecommunications service." 47 U.S.C. § 153(46). The information service known as Internet access and the telecommunications over which that service by definition rides are both being offered to the public for a fee by the cable companies using pole attachments for which those companies seek regulated rates. Thus, the pole attachments at issue are used to provide a telecommunications service, and such attachments are properly assigned the section 224(e) rate.

A plain reading of the Act also makes clear that Internet access service is not a "cable service," and that the entities making pole attachments to provide Internet access service are not operating "cable television systems" to the extent that they use their cable facilities to provide Internet access service. Properly determining that the pole attachments at issue are used to provide telecommunications services compels the result that rates for such attachments must conform to the criteria set forth in section 224(e) in the absence of a voluntary agreement between the utility and the attaching entity.[7]

To summarize, application of the authorities discussed below leads to the following conclusions. (1) As the

information service offered to the public for a fee necessarily includes a telecommunications service renders its analysis fatally incomplete.

[7] As EarthLink discusses in section C, *infra*, the Commission has made it clear that a single rate applies to each pole attachment, regardless of the number of different types of service provided using that attachment (*e.g.*, cable service and telecommunications service). This is consistent, for example, with the language of section 224(d)(3), which provides that the rate specified in that section applies to pole attachments used to provide both cable services and telecommunications services until the new rate described in section 224(e) is established. 47 U.S.C. § 224(d)(3). After February 8, 2001, when telecommunications services are offered over the same attachments as cable services, the section 224(e) rate applies. *See* Commission Appendix at 65a, n. 26.

Commission has stated, Internet access is an "information service" under the Act. (2) By the plain terms of the Act, "information services" are provided "via telecommunications." 47 U.S.C. § 153(20). (3) Telecommunications offered to the public for a fee constitutes "telecommunications service," "regardless of the facilities used." 47 U.S.C. § 153(46). (4) Pole attachments used to transmit Internet access service to the public are being used to provide a "telecommunications service" to which the section 224(e) pole attachment rate applies.

The purpose of this brief is to bring to the attention of the Court the legal authorities that provide this clear and simple resolution. In applying these authorities to the decision below, EarthLink urges the Court to overturn that part of the lower court's decision that states that the Commission has no authority to regulate pole attachments used by cable companies to deliver Internet access services, but to affirm those parts of the decision that hold that Internet access is not a cable service and that the Commission must follow the mandates of sections 224(d) and 224(e) in applying its pole attachment rate authority.

ARGUMENT

A. The Court Of Appeals Properly Rejected The Commission's Claim That It Could Disregard Subsections (d) and (e) Of Section 224.

At the outset, EarthLink agrees with the Eleventh Circuit and the utility companies that the proper application of section 224 requires that the statutory classification of the services for which pole attachments are used must always be determined before the Commission may set a rate for those attachments. *Gulf Power v. F.C.C.*, 208 F.3d at 1276; Commission Appendix at 27a; Brief in Opposition at 13. This is so because the Act provides *no* discretion to the Commission as to whether to apply the section 224(e) rate if

the pole attachment at issue is used to provide "telecommunications services." As the Commission itself held in the order under review, the provisions of section 224(e) are mandatory if they are applicable:

> We note that *in the one case where Congress affirmatively wanted a higher rate for a particular service offered by a cable system, it provided for one in section 224(e).* In requiring that the Section 224(d) rate apply to any pole attachment used 'solely to provide cable service,' we do not believe Congress intended to bar the Commission from determining that the Section 224(d) rate methodology also would be just and reasonable *in situations where the Commission is not statutorily required to apply the Section 224(e) rate.*

In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, Report and Order, 13 F.C.C.R. 6777, 6796; Commission Appendix at 90a (emphasis added) (the Commission's order below is hereinafter referred to as the "Order").

Because the Commission acknowledges that it must apply the section 224(e) attachment rate if a pole attachment is used to provide a "telecommunications service," and because the Commission further recognizes that the section 224(e) rate is different from the section 224(d) rate that the Commission chose to apply, it is necessary in applying section 224 first to determine whether the admittedly mandatory rates prescribed by section 224(e) apply. If those rates do apply, that is the end of the matter, and there is no need to determine whether the Commission has any discretion to set rates for services that could hypothetically fall outside of the "cable service" and "telecommunications service" classifications. Accordingly, the Commission's Order is fundamentally flawed because the Commission quite consciously decided not to answer the threshold question of whether the relevant pole attachments are used to provide a "telecommunications

service" (and are thus covered by section 224(e)), or whether they are used "solely to provide cable service" and are therefore grandfathered at a lower rate under section 224(d)(3). In its Order, the Commission stated:

> We need not decide at this time, however, the precise category into which Internet services fit. Such a decision is not necessary in order to determine the pole attachment rate applicable to cable television systems using pole attachments to provide traditional cable services and Internet services.

Commission Appendix at 89a-90a.

If it turned out that cable-based Internet access services were in fact "solely" cable services, then the analytical infirmity of the Commission's abbreviated approach would have no practical effect because the rate that the Commission set would comport with the rate set by the statute, albeit for a reason different from that stated by the Commission. In a more complex situation, if the Commission had determined that the pole attachments were used to provide neither a "cable service" nor a "telecommunications service," then this Court would be faced with two questions. The first would be whether the Commission was correct in its classification of the service for which pole attachments were sought. If that question were answered in the affirmative, the second question that would have to be addressed would be the one that the Commission seeks to have answered, namely, whether the Commission has independent authority under sections 224(a)(4) and 224(b)(1) to set pole attachment rates for cable facilities used to transmit Internet access services. Neither of those scenarios is presented here.

As EarthLink demonstrates below, the pole attachments at issue here are used to provide a "telecommunications service" when they are used for communications links over which Internet access services are transmitted to the public.

Accordingly, the Commission's failure to address the question of whether the pole attachments are used in the provision of telecommunications services renders its Order invalid. However, because the pole attachments at issue are as a matter of law used to provide "telecommunications service," the Eleventh Circuit's holding that the Commission has no jurisdiction over cable company attachments used to provide Internet access service is incorrect and should be reversed.[8]

B. Internet Access Service Is Not A "Cable Service," And The Entities That Seek Attachments Do Not Operate "Cable Television Systems" When They Provide Internet Access Service.

As noted above, if the service at issue were in fact "solely" a cable service, then the Commission's Order, although analytically infirm, would be legally supportable on grounds other than those offered by the Commission. This possibility need not long delay the Court. The Eleventh Circuit's reasoning as to why Internet access is not a "cable service" is undeniably correct. That reasoning echoes the reasoning of the Ninth Circuit Court of Appeals in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 1999). Both the Eleventh Circuit and the Ninth Circuit properly concluded that the Communications Act's definition of "cable service," which states that cable service is the "one-way transmission to subscribers of (i) video programming, or (ii) other programming service. . . ," does not apply to Internet access service. 47 U.S.C. § 522(6). As both courts recognized, Internet traffic is in no sense "one-way," nor does it have the

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[8] Because the Act is clear that the definition of "telecommunications service" does not depend on the nature of the facilities used to provide that service, 47 U.S.C. § 153(46), EarthLink agrees with the FCC that the Eleventh Circuit's decision on the second issue on which certiorari was granted should be reversed.

other attributes of the services that Congress designated as "cable services." *See Portland*, 216 F.3d at 876-77; *Gulf Power*, 208 F.3d at 1276-77; Commission Appendix at 27a-29a. *But see MediaOne Group, Inc. v. County of Henrico, Virginia*, 97 F. Supp.2d 712, 715 (E.D. Va. 2000) (*appeal pending* 4th Cir.). Accordingly, the decision below should be affirmed as written with respect to the conclusion that Internet access service is not a "cable service."

Related to the point that Internet access services are not cable services is the fact that the transmission facilities for which cable companies here seek attachments are not "cable television systems" under the plain language of the Act when they are used to provide Internet access services to the public. The Commission places heavy emphasis on the fact that section 224(a)(4) defines "pole attachment" as "*any* attachment by a cable television system or provider of telecommunications service. . . ." Commission Petition at 12 (emphasis in original). The Commission's emphasis on the word "any" is not by itself inappropriate, but that emphasis overlooks the need to scrutinize carefully the definition of the term "cable television system." That term is not defined in the Act, but it is defined in the Commission's regulations. 47 C.F.R. § 76.5(a) sets forth the same definition for both "cable system" and "cable television system." That regulation reads in relevant part as follows:

> (a) *Cable system or cable television system.* A facility consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, *but such term does not include*: . . .
>
> (3) *A facility of a common carrier which is subject, in whole or in part, to the provisions of Title II of the Communications Act of 1934*, as amended, except that

> such facility shall be considered a cable system to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services.

47 C.F.R. § 76.5(a) (emphasis added).[9]

For three reasons, all major cable companies are in fact common carriers "subject, in whole or in part," to Title II of the Communications Act, and their systems are thus not "cable television systems" except to the extent that they are used to transmit video programming.[10] First, in *City of Dallas, Texas v. F.C.C.*, 165 F.3d 341 (5th Cir. 1999), *on remand* 14 F.C.C.R. 19700, the NCTA mounted a successful challenge to a Commission order regarding open video systems on the grounds that the Commission arbitrarily differentiated between traditional local exchange carriers ("LECs") and cable-based LECs. NCTA's position was necessarily premised on the fact that cable companies are LECs. *Id.* at 353-354. All LECs are undoubtedly covered by Title II of the Act. *See, e.g.*, 47 U.S.C. § 251(b). Second, as EarthLink discusses in greater detail below, cable companies are

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[9] The Commission must, of course, follow its own regulations. *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). With the exception of a deleted parenthetical that is not here relevant, the Commission's regulatory definition of "cable system" and "cable television system" is verbatim the definition provided by the Act for "cable system." 47 U.S.C. §§ 153(8), 522(7). That the two terms are synonymous is also demonstrated by the second sentence of section 224(d)(3), which uses the term "cable system" instead of "cable television system."

[10] The Act defines "video programming" as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(20). It is self-evident that Internet access does not fit that definition, and the Commission has so ruled. *In the Matter of Internet Ventures, Inc. and Internet On-Ramp, Inc. Petition for Declaratory Ruling*, Memorandum Opinion and Order, 15 F.C.C.R. 3247, 3253-54 (2000).

telecommunications carriers subject to Title II of the Act because they are providing to the public for a fee the transmission ("telecommunications") necessary to deliver the very Internet access services here at issue. 47 U.S.C. §§ 153(20) and 153(46). Third, petitioner NCTA flatly told the Commission that its members provide telecommunications services: "NCTA's members also utilize poles, conduits and rights of way to deliver telecommunications services." *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, CS Docket No. 97-151, Comments of NCTA at 1 (Sept. 26, 1997).

Because cable companies use the same facilities[11] to provide both cable services and telecommunications services that are subject to Title II of the Act, their systems fall within the 47 C.F.R. § 76.5(a)(3) exclusion from the definition of "cable television system" to the extent that they are used to provide any service other than video programming. Accordingly, the pole attachments at issue cannot be regulated as attachments made by a "cable television system" and must be regulated as attachments made by "providers of telecommunications services," i.e. "telecommunications carriers." 47 U.S.C. § 153(44) (" 'telecommunications carrier' means any provider of telecommunications services"). This analysis by itself entirely disposes of the Commission's argument that sections 224(a)(4) and 224(b)(1) provide it with authority to regulate the rates for the pole attachments at issue here, because the Commission's Order is premised entirely on the incorrect assumption that the Commission is dealing with "cable television systems."[12]

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[11] *See* Commission Petition at 13 ("Cable television service and Internet access are routed through the same pole attachments–indeed, through the same wires at the same time.").

[12] *See* Commission Appendix at 90a. In *Texas Utilities Electric Co. v. F.C.C.*, 997 F.2d 925 (D.C. Cir. 1993), a case relied upon heavily by petitioners, the court rejected an argument that the Commission's then-existing regulatory definition of "cable television system" excluded coverage under section 224 for pole attachments by cable companies used for services other than "cable services." The court's rejection of that argument was based primarily on the notion that it did not believe that Congress intended to limit cable companies' pole attachment rights only to those attachments used to provide traditional video programming. *Id.* at 931. That concern has been obviated by the 1996 amendments, under which section 224 now provides mandatory pole attachment rights and regulated rates for "pole attachments used by telecommunications carriers to provide telecommunications services. . . ." 47 U.S.C. §§ 224(e) and 224(f). Inasmuch as it is the use of a cable facility to provide telecommunications services (which are regulated under Title II of the Act) that triggers the exclusion found at 47 C.F.R. § 76.5, the section 224 coverage of pole attachments used to provide telecommunications services ensures that the exclusion creates no gap in the section 224 authority. Moreover, whereas the definition of "cable system," which the Commission has defined as meaning the same thing as "cable television system," applied prior to the passage of the Telecommunications Act of 1996 only to Title VI of the Act (*see* Commission Appendix at 83a), the definition of "cable system" now expressly applies to the entire Act. 47 U.S.C. § 153(8).

C. The Pole Attachments At Issue Are Used To Provide A Telecommunications Service Under the Plain Language of the Statute and the Commission's Longstanding Precedent.

The Commission in its Order simply chose not to address whether the pole attachments at issue are used to provide telecommunications services. The Eleventh Circuit began that analysis, but stopped too soon. The court of appeals correctly noted that Internet access is an information service, not a telecommunications service. *Gulf Power*, 208 F.3d at 1277, 1278; Commission Appendix at 30a-31a. As EarthLink demonstrates below, however, the finding that Internet access is an information service compels rather than defeats the conclusion that pole attachments used in the delivery of Internet access services to the public are used to provide telecommunications services.

The error in the lower court's analysis is that it failed to distinguish between the information processing functions that make Internet access service an "information service" under the Act and the transmission functions through which the information service is delivered to consumers. It is the transmission function ("telecommunications service") for which pole attachments are required, and it is that function, not the information processing function, that defines the uses to which pole attachments are put. The Ninth Circuit in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), succinctly described the distinction between the information service and telecommunications service functions that are combined to provide Internet access:

> Like other ISPs, @Home consists of two elements: a "pipeline" (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs, @Home controls all of the transmission facilities between its subscribers and the Internet. To the extent @Home is a conventional ISP, its activities are that of an information service. However, to the extent that @Home provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.

Id. at 878.

Before addressing in depth why the offering of Internet access service to the public necessarily includes the offering of a telecommunications service, EarthLink notes that the "commingling"[13] of telecommunications services with other services has no impact on the proper pole attachment rate. Specifically, once it is determined that a pole attachment is used to provide a telecommunications service (*see* sections C.1 and C.2, *infra*), the section 224(e) rate applies to that

[13] *See* Commission Reply to Brief in Opposition at 3.

attachment regardless of what other services may be offered using the same attachment. The Commission stated: "Separately, Section 224(e)(1), the subject of this Order, governs rates for pole attachments used in the provision of telecommunications service, including single attachments used jointly to provide both cable and telecommunications service." Commission Appendix at 64a-65a. That section 224(e)(1) applies to cable operators is reinforced by the Commission's regulations, which state: "Cable operators must notify pole owners upon offering telecommunications services." 47 C.F.R. § 1.1403(e).

In this regard, section 224(e), unlike section 224(d)(3), does not contain the word "solely." The section 224(e) rate applies to *any* attachment that a provider of telecommunications uses to provide a telecommunications service. 47 U.S.C. § 224(a)(4). Accordingly, it is irrelevant for the purposes of applying section 224(e) that a telecommunications service is in turn used to deliver a separate service, such as Internet access. The Commission, and apparently all of the parties, agreed on this point in the Commission's proceeding below:

> We also agree with cable operators, telecommunications carriers, and utility pole owners that, if an attachment previously used for providing solely cable services would, as a result of the leasing of dark fiber, also be used for providing telecommunications services, the rate for the attachment would be determined under Section 224(e), consistent with our discussion regarding restrictions on service provided over pole attachments.

Commission Appendix at 118a-119a (footnotes omitted). The Commission's conclusion that an attachment previously used "solely to provide cable service" is governed by section 224(e) once that attachment is also used to provide a

telecommunications service has not been challenged by any party.[14]

Having established that the section 224(e) rate applies in every case in which a pole attachment is used in the provision of a telecommunications service (whether alone or in combination with another service), EarthLink next demonstrates why, under the plain language of the Act and twenty years of Commission precedent, there is necessarily a telecommunications service being offered in each instance in which an Internet access service is offered to the public for a fee. We begin with the statutory language, followed by a discussion of the Commission's orders applying that language.

1. The Communications Act Analysis

The first step in the analysis set forth below renders the result that Internet access is itself an "information service." The second step, which requires nothing more than a plain reading of the definition of "information service," demonstrates that information services are provided "via telecommunications." 47 U.S.C. § 153(20). The third step asks whether the telecommunications over which the information service is provided is offered "for a fee directly to the public or to such classes of users as to be effectively available directly to the public" so as to fall within the

[14] In an earlier, related pole attachment proceeding, the Commission said:

> The 1996 Act also created a distinction between pole attachments used by cable operators solely to provide cable service and pole attachments used by cable operators or by any telecommunication[s] carrier to provide any telecommunications service. The Act prescribed a new methodology for determining pole attachment rates for the latter group.

In the Matter of Implementation of Section 703 of the Telecommunications Act of 1996, 11 F.C.C.R. 9541, 9544 (1996).

definition of "telecommunications services," 47 U.S.C. § 153(46), and thus within the scope of section 224(e).

a. Internet Access Service Is Itself An "Information Service."

The Act states that:

> The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

47 U.S.C. § 153(20). The "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information" describes precisely the characteristics of Internet access service and the purposes for which consumers use that service.[15] The Commission has recognized this and has held that "Internet access" is an information service:

> In order to provide those components of Internet access services that involve information transport, ISPs lease lines, and otherwise acquire telecommunications, from telecommunications providers–LECs, CLECs, IXCs, and others. . . . *Thus, the information service is provisioned by the ISP "via telecommunications" including interexchange communications although the Internet service itself is an "information service" under section*

[15] *See In The Matter Of Federal-State Joint Board on Universal Service*, Report To Congress, 13 F.C.C.R. 11501, 11540 n.165 (1998) (hereinafter "*Universal Service Report to Congress*") ("the very core of the Internet and its associated services is the ability to 'retrieve' and 'utilize' information").

3(20) of the Act, rather than a telecommunications service.

In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Order on Remand, 15 F.C.C.R. 385, 401 (Dec. 23, 1999) (emphasis added).[16]

b. Information Services Such As Internet Access Are Delivered Via Telecommunications.

The Act states that "information service means the offering of a capability for generating, acquiring . . ., or making available information *via telecommunications*. . . ." 47 U.S.C. § 153(20) (emphasis added). Accordingly, because Internet access service is an information service, it is clear from the statute that Internet access service is provided "via telecommunications." *Id.*

c. The Telecommunications Used To Deliver The Information Service Known As Internet Access Is Offered To The Public For A Fee And Is Thus A Telecommunications Service.

That Internet access is an information service provided "via telecommunications" does not by itself answer the question of whether the telecommunications used to provide Internet

[16] The Commission had earlier reported to Congress that Internet access is an "information service":

> The provision of Internet access service involves data transport elements: an Internet access provider must enable the movement of information between customers' own computers and the distant computers with which those customers seek to interact. But the provision of Internet access service crucially involves information processing elements as well; it offers end users information-service capabilities inextricably intertwined with data transport. *As such, we conclude that it is appropriately classed as an "information service."*

Universal Service Report to Congress, 13 F.C.C.R. at 11540 (footnote omitted) (emphasis added).

access is a "telecommunications service," a term that the Act defines separately from "telecommunications." The Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). In order to determine whether the offering of Internet access service (an information service) includes the offering of a "telecommunications service," it is necessary under the third step of the analysis outlined above to determine whether the "telecommunications" that the Act states is used to provide the "information service" known as Internet access is being offered "for a fee directly to the public." *Id.*

Petitioner NCTA has answered that question in the affirmative for the cable companies. NCTA's petition for certiorari conclusively establishes that the cable industry is holding itself out to a large segment of the public as a provider of Internet access:

> Recent technological advances have allowed cable operators, who have invested billions of dollars in the effort, to upgrade further their existing coaxial cables and other equipment so that they can simultaneously carry both traditional video programming services and high-speed or "broadband" Internet access at data transmission speeds hundreds of times faster than the "narrowband" services available through traditional telephone lines. *The cable industry thus actively competes against numerous segments of the communications industry to provide high-speed Internet services to consumers nationwide.*

NCTA Petition for a Writ of Certiorari at 4 (emphasis added). The NCTA in its petition also cites to a Commission report that found as of October 30, 2000, the cable industry provided approximately 2.2 million high speed lines connecting consumers to the Internet. NCTA Petition at 5. Under any

recognizable definition of the "public," the cable industry is providing Internet access—and thus necessarily the "telecommunications" over which Internet access rides—to the public.[17]

The remaining question that must be answered in order to determine if the telecommunications offered by cable companies that provide Internet access to the public is a "telecommunications service" is whether such companies offer that telecommunications "for a fee." 47 U.S.C. § 153(46). Common sense and simple economics dictate that cable companies are not giving away Internet access or the telecommunications over which Internet access is delivered, and EarthLink does not expect any cable company to argue that it is doing so. Public advertising and information distributed by cable companies that offer Internet access service confirm that customers must pay for the service. For example, the web sites of major cable operators such as Cox, Comcast, and AT&T all describe standard rate options for various cable-based Internet access services. These companies' rates can be viewed electronically at, respectively, www.cox.com, www.comcast.com, and

[17] The classic test for determining whether a telecommunications provider is a "common carrier" for purposes of the Communications Act is set forth in *National Association of Regulatory Utility Commissioners v. F.C.C.*, 525 F.2d 630 (D.C. Cir. 1976), *cert. den'd* 425 U.S. 992 ("*NARUC I*"). Under the *NARUC I* test, which provides that service providers are common carriers if they hold themselves out indiscriminately to serve the public, it is not necessary that "a given carrier's services must practically be available to the entire public." Instead, "one must hold oneself out indiscriminately to the clientele one is suited to serve. . . ." *Id.* at 641. Under the figures cited by the NCTA, this test is clearly met. The D.C. Circuit recently upheld a Commission ruling that the *NARUC I* test is applicable to determine when a carrier is a "telecommunications carrier" (*i.e.*, a "provider of telecommunications services," 47 U.S.C. § 153(44)) under the Communications Act, as amended by the Telecommunications Act of 1996. *Virgin Islands Telephone Corp. v. F.C.C.*, 198 F.3d 921, 926 (D.C. Cir. 1999).

www.athome.att.com. Cable companies that provide Internet access and its necessary telecommunications component thus meet the final test for providing "telecommunications service," namely, that the service is offered "for a fee." 47 U.S.C. § 153(46). Accordingly, the section 224(e) rate must apply.

In other fora, members of NCTA have suggested that the fact that end users are charged a single fee for Internet access means that no fee is charged for the telecommunications component of that service, and that the cable company is therefore not providing telecommunications to the public for a fee. The Commission has consistently rejected the argument that charging a single fee for the combined offering of an information service and the telecommunications service over which it rides means that no fee is charged for the telecommunications component: "As we have stated *basic services form one component of the charges for enhanced services*–the remaining components of which are available from the competitive resources and capabilities of the data processing industry."[18] *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations* (Second Computer Inquiry), Final Decision, 77 F.C.C.2d 384, 435 (1980) (emphasis added) (hereinafter "*Computer II*"). *See also In the Matter of Federal-State Joint Board on Universal Service*, Fourth Report and Order On Reconsideration, 13 F.C.C.R. 5318, 5474 (1997) ("We disagree with ITAA's contention that, because systems integrators provide both basic telecommunications services as well as enhanced services for a single price, systems integrators are engaged exclusively in the provision of enhanced information services."); *see also In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Report and Order, CC Docket Nos. 96-61, 98-183, ¶40

[18] "Basic services" are "telecommunications services." *See* n. 19 *infra*.

(March 30, 2001) (reaffirming that carriers that provide packages of telecommunications and enhanced services at a single price must make transmission capacity available separately).

Thus, under the plain language of the statute and the facts as presented by petitioner NCTA, the pole attachments here at issue are used to provide "telecommunications service." Pole attachments for those services are therefore regulated under section 224(e) of the Act.

2. Twenty Years Of Commission Precedent Holds That Information Services Offered To The Public Are Always Delivered Using A Telecommunications Service.

The conclusion from the plain language of the Act that the offering of Internet access services to the public for a fee necessarily includes the offering of a telecommunications service is supported by twenty years of Commission precedent.

Since its decision in *Computer II*, the Commission has consistently held that every information service that is offered to the public is delivered by a common carrier transmission service (*i.e.*, a "telecommunications service"). *See* 47 U.S.C. § 153(44)("A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is providing telecommunications services. . . .").

In *Computer II*, the Commission established a regulatory regime that created a distinction between so-called "enhanced" computer processing services and "basic" transmission services. Under the basic/enhanced distinction of *Computer II*, the Commission chose to regulate "basic service" as a common carrier offering, but decided as a general matter to exempt from common carrier regulation "enhanced services" provided using those basic services.

Computer II, 77 F.C.C.2d at 418-19, 423. After the passage of the Telecommunications Act of 1996, the Commission reaffirmed its *Computer II* holding and restated its *Computer II* order in the language of the amended Act, replacing the term "basic service" with "telecommunications service" and the term "enhanced service" with "information service."[19]

The Commission described the distinction and the relationship between enhanced services and basic services this way in *Computer II*:

> [A]n essential thrust of this proceeding has been to provide a mechanism whereby non-discriminatory access can be had to basic transmission services by all enhanced service providers. *Because enhanced services are dependent upon the common carrier offering of basic service, a basic service is the building block upon which enhanced services are offered.*

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[19] The Commission reported the following to Congress:

> Reading the statute closely, with attention to the legislative history, we conclude that Congress intended these new terms to build upon frameworks established prior to the passage of the 1996 Act. *Specifically, we find that Congress intended the categories of "telecommunications service" and "information service" to parallel the definitions of "basic service" and "enhanced service" developed in our Computer II proceeding*, and the definitions of "telecommunications" and "information service" developed in the Modification of Final Judgment breaking up the Bell system.

Universal Service Report To Congress, 13 F.C.C.R. at 11511 (emphasis added). In a proceeding begun prior to that report, the Commission sought comment on its general conclusion that "basic service" and "telecommunications service" are the same. *In the Matter of Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, 13 F.C.C.R. 6040, 6066-67 (1998). The Commission has recently asked parties to refresh the record in that proceeding. *See Update and Refresh Record on Computer III Requirements*, 66 Fed. Reg. 15064 (2001).

Id. at 475 (emphasis added). Under this framework, which the Commission has determined Congress adopted in the Telecommunications Act of 1996,[20] it is possible for a telecommunications service to exist without an information service, but it is logically, technically, and legally impossible for an information service that is offered to the public for a fee to exist without an underlying telecommunications service. Quite simply, the only way that an information service can reach the public is over a telecommunications service. Moreover, the Commission has made it clear that the fact that a telecommunications service is used to provide an information service does not in any way change the statutory classification of the telecommunications service:

> Bell Atlantic seems to reason that because enhanced services are not common carrier services under Title II, the basic services that underlie enhanced services are somehow also not subject to Title II. We do not agree. *Enhanced services by definition are services "offered over common carrier transmission facilities." Since the Computer II regime, we have consistently held that the addition of the specified types of enhancements (as defined in our rules) to a basic service neither changes the nature of the underlying basic service when offered by a common carrier* nor alters the carrier's tariffing obligations, whether federal or state, with respect to that service.

Filing and Review of Open Network Architecture Plans, 4 F.C.C.R. 1, 141 (1988) (brackets in original) (emphasis added).

More recently, the Commission reiterated the principle that the fact that a telecommunications service is used to deliver an information service (specifically, Internet access) in no

[20] *See* note 19, *supra*.

way changes the nature of the underlying telecommunications service:

> [C]arriers which offer basic interstate telecommunications functionality to end users (such as ISP subscribers) are "telecommunications carriers" covered by the relevant provisions of section 251 and 254 of the Act "regardless of the underlying technology those service providers employ, *and regardless of the applications that ride on top of their services*." In other words, even though the access provided to the ISP by the local exchange carrier facilitates the delivery of an information service because of the "applications that ride on top" of the telecommunications service, that same access necessarily facilitates the origination of the underlying telephone toll service used to transport the ISP's Internet access service.

In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Order on Remand, 15 F.C.C.R. 385, 402-03 (1999) (italics in original).

The authorities cited above make it clear that the fact that an ISP uses telecommunications services obtained from a separate carrier does not change the statutory classification of the telecommunications service. That this is the case is underscored by the fact that the Commission did not even discuss in its Order the possibility that a telecommunications carrier whose customers include ISPs or ISP subscribers would somehow lose its pole attachment rights or pay anything other than the section 224(e) rate for attachments so employed.

It is similarly clear that the statutory classification of a telecommunications service used to provide an information service does not change when a telecommunications carrier uses its own transmission facilities to provide that

information service. The Commission addressed precisely this issue in 1995:

> Thus, having applied Commission Rules and found that Frame Relay Service is a basic service, we conclude that, pursuant to the Computer II decision, *all facilities-based common carriers providing enhanced services in conjunction with basic frame relay service must file tariffs for the underlying frame relay service* and acquire that tariffed service in the same manner as resale carriers.

In the Matter of Independent Data Communications Manufacturers' Association, Inc., Petition for Declaratory Ruling That AT&T's Frame Relay Service Is A Basic Service, Memorandum Opinion and Order, 10 F.C.C.R. 13171, 13725 (1995) (emphasis added) (hereinafter "*Frame Relay Order*"); *see also Portland*, 216 F.3d at 878.

Earlier in the *Frame Relay Order*, the Commission specifically declined to apply the so-called "contamination theory" to facilities-based carriers that provide both basic (telecommunications) services and enhanced (information) services. The "contamination theory" is the mechanism by which the Commission has chosen to exempt from common carrier regulation those information service providers (such as EarthLink) that do not own their own transmission facilities and therefore purchase telecommunications service from others in order to deliver their information services.[21] In

[21] The name for the contamination theory comes from the concept that, with respect to information service providers that do not use their own transmission facilities, the combining of the information service provider's information services with the telecommunications service purchased from a common carrier "contaminates" the telecommunications service and, *for the purposes of the Commission's exercise of common carrier authority over the non-facilities-based information service provider only*, renders the entire offering an unregulated information service. *See, e.g., Frame Relay Order*, 10 F.C.C.R. at 13719. The

declining to apply the contamination theory to facilities-based carriers, the Commission summarized the purpose of keeping the telecommunications service and information service functions separate for regulatory purposes, especially when both services are offered by the same entity:

> Moreover, application of the contamination theory to a facilities-based carrier such as AT&T would allow circumvention of the Computer II and Computer III basic-enhanced framework. AT&T would also be able to avoid Computer II and Computer III unbundling and tariffing requirements for any basic service that it could combine with an enhanced service. This is obviously an undesirable and unintended result.

Frame Relay Order at 13723.

All of these authorities point to the same conclusion: a telecommunications service used to transmit an information service remains a telecommunications service. Despite the clarity of the Act and the Commission's own precedent, the Commission in the Order under review has *sub silentio* adopted a rule that treats telecommunications services offered by cable companies in combination with information services (here, Internet access services) differently than the same telecommunications services offered in combination with information services by more traditional telecommunications

rationale for exempting from common carrier regulation those information service providers that do not own their own transmission facilities is that the Commission will in every instance continue to regulate the telecommunications service that underlies an offering to the public of information services, whether that telecommunications service is purchased by the information service provider from a third party or provided using the information service provider's own facilities. *See, e.g., Computer II*, 77 F.C.C. 2d at 429 ("This structure enables us to direct our attention to the regulation of basic services and to assuring nondiscriminatory access to common carrier telecommunications facilities by all providers of enhanced services.").

carriers.[22] Specifically, although the Commission appears to have no doubt that a telephone company that also provides Internet access to the public is necessarily offering telecommunications service (and thus may obtain pole attachments at the section 224(e) rate), the Commission has, without explanation, simply ignored the fact that a cable company providing the same combination of services is also providing a telecommunications service.

The statute does not allow this. The Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public . . ., *regardless of the facilities used*." 47 U.S.C. § 153(46) (emphasis added). As the Commission has affirmatively acknowledged in the specific context of transmission services associated with Internet access, cable companies can and do provide telecommunications services:

> Stated differently, *when other telecommunications carriers, such as interexchange carriers (IXCs) or cable service providers*, compete with the BOCs in providing basic services to ISPs, the BOCs are less able to engage successfully in discrimination and cost misallocation because they risk losing business from their ISP customers for basic services *to these competing telecommunications carriers*.

In The Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Further Notice Of Proposed

[22] Twenty-five years ago, the U.S. Court of Appeals for the District of Columbia Circuit reversed a Commission decision that made the same mistake. In *National Association of Regulatory Utility Commissioners v. F.C.C.*, 553 F.2d 601 (1976) ("*NARUC II*"), the court rejected the Commission's argument that two-way, non-video communications services offered by cable companies were not common carrier services because those services "were carried by entities (cable operators) previously adjudged to be non-common carriers." *Id.* at 608 (footnote omitted).

Rulemaking, 13 F.C.C.R. 21531, 21555 (1998) (emphasis added). For the purposes of section 224 and for the purposes of those provisions of the Act that do not deal with distinctions among local exchange carriers, the Act treats all telecommunications carriers alike. One of the clear purposes of the 1996 amendments to section 224 and to other provisions of the Communications Act was to place telecommunications carriers on a regulatorily neutral field without regard to whether those carriers began life as telephone companies or cable companies.[23] The Commission has disregarded this guiding principle in a number of proceedings dealing with cable facilities. In the current case, the Commission's refusal to follow the plain mandate of Congress has resulted in an analysis and an Order that cannot be upheld.

CONCLUSION

The Commission failed in its Order to answer the question that is essential to the proper application of section 224 to pole attachments made by cable companies that provide Internet access to the public using their own transmission facilities. Specifically, the Commission refused to decide whether such pole attachments are used "solely to provide cable service," or whether they are used to provide "telecommunications services." The court of appeals correctly decided that the pole attachments at issue were not used "solely to provide cable service," on the grounds that

[23] Indeed, as the court noted in *City of Dallas v. F.C.C.*, 165 F.3d 341 (5th Cir. 1999), "two of the primary goals of the Act were to facilitate cable companies' becoming LEC's and to permit LEC's to become cable companies." *Id.* at 354 n.13; *see also In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499, 15989-90 (1996) ("We believe, as a general policy matter, that all telecommunications carriers that compete with each other should be treated alike regardless of the technology used unless there is a compelling reason to do otherwise.").

Internet access is not a "cable service" under the Act. The court went on to hold, however, that the Commission does not have jurisdiction to regulate pole attachments for cable facilities used to provide Internet access services because Internet access services are information services rather than telecommunications services. This second holding by the court of appeals is incorrect because it fails to recognize that every information service offered to the public for a fee is necessarily provided over a telecommunications service. Both the plain language of the Communications Act and twenty years of Commission precedent teach that telecommunications services used to deliver information services do not cease to be telecommunications services simply because of the use to which they are put.

Based on the foregoing, the holding of the Eleventh Circuit that the pole attachments here at issue are not used "solely to provide cable service" should be affirmed, and the Eleventh Circuit's holding that the Commission may not regulate such pole attachments under its section 224(e) authority over pole attachments used for telecommunications services should be reversed.

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IN THE
Supreme Court of the United States

NATIONAL CABLE TELEVISION ASSOCIATION, *ET AL.*,
Petitioners,

and

FEDERAL COMMUNICATIONS COMMISSION, AND
THE UNITED STATES OF AMERICA
Petitioners,

v.

GULF POWER, *ET AL.*,
Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* CONSUMERS UNION, *ET AL.*, IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICI CURIAE*

Consumers Union, Consumer Federation of America, United Church of Christ, Office of Communication, Inc., and Center for Media Education [hereinafter "CU, *et al.*," or "citizen *amici*"] file this *amicus curiae* brief pursuant to Rule 37.3(a) of the Supreme Court Rules.[1] Copies of the parties' written consent and this brief are being filed simultaneously with the Clerk.

CU, *et al.*, seek to protect the current open, free nature of the Internet. CU, *et al.*, collectively represent approximately 40 million citizens and residents of the United States. CU, *et al.*, represent the interests of Internet users. These organizations seek to promote access to diverse information sources in the media, pursue competition that will reduce prices and increase product quality, and enhance citizen access to civic information that will enable them to participate more fully in this Nation's democratic institutions.

Citizen *amici* believe that the business model currently utilized by the cable television industry to offer high speed Internet access will destroy the free nature of the Internet. Citizen *amici* have vigorously pursued legal and regulatory efforts to prevent this from happening.[2]

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[1] Pursuant to this Court's Rule 37.6, CU, *et al.*, and CU, *et al.*'s counsel certify that no counsel for a party authored this brief in whole or in part and no person or entity other than CU, *et al.*, and CU, *et al.*'s counsel made any monetary contribution to the preparation of this brief.

[2] One or more of the four organizations submitting this brief have, *inter alia*, submitted *amicus curiae* briefs before the

Motivating CU , *et al.*, to submit this brief is CU, *et al.*'s concern that extraordinarily negative consequences will flow from any decision of this Court that Internet access delivered over cable television infrastructure meets the statutory definition of "cable service." CU, *et al.*, recognize that it is quite possible that this Court may conclude that it is unnecessary to resolve the question at this time. CU, *et al.*, file this brief, however, because a decision that Internet access over cable infrastructure is a "cable service" would imperil the open and competitive characteristic of the Internet which entitles it to the highest First Amendment protection.

Because significant importance will attach to any decision defining the regulatory status of cable-delivered Internet service, citizen *amici* address this brief exclusively to the legal questions which will arise if this Court upholds the Eleventh

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two U.S. Courts of Appeals that have considered this question, *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2000); *MediaOne Group, Inc. v. County of Henrico,* No. 00-1680 (L) (4th Cir. oral argument held Sept. 27, 2000), and filed in several merger and regulatory proceedings before the FCC, including its review of AT&T's purchase of TCI, Inc., *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from TCI to AT&T*, 14 FCC Rcd. 3160 (1999), and of MediaOne, *Application of Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, 15 FCC Rcd. 9816 (2000), and the AOL/Time Warner merger, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee*, CS Docket No. 00-30, FCC 01-12 (rel. Jan 22, 2001) [hereinafter *"AOL/Time Warner Order"*].

Circuit's determination that, to benefit from Section 224 of the Communications Act of 1934, codified at 47 U.S.C. §§ 153 *et seq.* [hereinafter "the Act"], 47 U.S.C. § 224, a service offering must be either a "cable service" or a "telecommunications service." *Gulf Power v. FCC*, 208 F.3d 1263 at 1276 (11th Cir. 2000); Gov't Pet. App. at 27a.[3]

If this Court determines that it is inappropriate to remand this matter and require the FCC to consider and resolve the status of cable-delivered Internet service, citizen *amici* here demonstrate why Internet service delivered over cable infrastructure is not a "cable service" as that term is used in the Act. In addition, citizen *amici* explain that a decision to the contrary will endanger the free and open character of the Internet, thus implicating First Amendment principles.

In the interest of avoiding repetition, citizen *amici* endorse the analysis of *amicus curiae* Earthlink, Inc., that Internet service delivered via cable infrastructure includes within it a "telecommunications service."

SUMMARY OF ARGUMENT

First, CU, *et al.*, demonstrate, through detailed textual analysis of the statute, that Internet access offered via cable television infrastructure does not meet the definition of "cable service" under the Communications Act.

Specifically, under the statute, "cable service" must be "one-way." As the U.S. Court of Appeals for the Ninth Circuit found, Internet access is highly interactive, and cannot be

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[3] All references to the record below are to the Government's Appendix to its Petition for *Certiorari*, Docket 00-843.

described as "one-way." In addition, to be a "cable service," Internet access must fall within the definition of either "video programming" or "other programming service." It is neither. The FCC squarely held that cable-delivered Internet access does not meet the definition of "video programming."

More important, the definition of "other programming service" requires provision of information to "all subscribers generally." But a cable operator makes available to "all subscribers generally" only the infinitesimal portion of total Internet content that it produces and publishes on its own web pages, home page, or through licensing agreements. Furthermore, one cannot plausibly classify as a "cable service" any service that "makes available" Internet content by providing a communications link alone. To do so would subsume all communications links within the definition, including basic telephone service.

The 1996 amendments to the definition of "cable service" do not alter this result. These amendments added two words—"or use"—to modify the limited subscriber interaction included within the definition of "cable service." These words do not modify the mandatory requirement that "cable service" be "one-way" and be "video programming" or "other programming." Nor can a single line of legislative history expand the impact of that amendment beyond its plain meaning.

Second, CU, *et al.*, elaborate on the important characteristics of the Internet that imbue it with great value, and with full First Amendment protection. CU, *et al.*, describe the impact of allowing cable operators to offer Internet access under regulations that apply to "cable service." In short, cable operators will have the incentive and the technical capability to limit subscribers' ability to reach certain content via the Internet. This discrimination may be subtle, and thus virtually undetectable by the user. Citizens and consumers will no longer receive the benefit of the open and participatory form of communication this Court described, and protected, in *Reno v. ACLU*, 521 U.S. 844, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997).

ARGUMENT

I. Internet Access is Not a "Cable Service" as Defined by the Act.

Claims that Internet access delivered via cable television infrastructure is a "cable service" directly conflict with the language of the Act.

Section 602(6) of the Act defines "cable service" as follows:

> (A) the *one-way* transmission to subscribers of (i) video programming, or (ii) other programming service, and
>
> (B) subscriber interaction, if any, which is required for the *selection or use of such video programming or other programming service.*

47 U.S.C. § 522(6) (emphases added). Internet access fails to meet this definition because it is not a "one-way transmission." Moreover, it is not "video programming" or "other programming." Finally, as the Eleventh Circuit correctly determined, Congress' addition of the words "or use" in 1996 to modify the term "subscriber interaction" did not override the basic definition of "cable service." *Gulf Power*, 208 F.3d at 1276-77; Gov't Pet. App. at 27a-29a.

A. Internet Access is Not a "One-Way" Transmission.

The first mandatory characteristic of a "cable service" is that it must be a "*one-way* transmission to subscribers." 47 U.S.C. § 522(6) (emphasis added).[4] *See AT&T v. City of Portland,* 216 F.3d 871, 876 (9th Cir. 2000) ("the essence of cable service ... is one-way transmission of programming generally to subscribers.")

Internet access does not consist solely, or even primarily, of a "one-way transmission." Indeed, as this Court found in *Reno v. ACLU*, the Internet is "the most participatory form of mass speech yet developed." 521 U.S. 844, 863, 117 S.Ct. 2329, 2340 (quoting 929 F.Supp. at 879). Through the Internet "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox." 521 U.S. at 870, 117 S.Ct. at 2344.

Accordingly, when the U.S. Court of Appeals for the Ninth Circuit considered whether Internet access meets the definition of "cable service," it cogently explained that Internet access is not a one-way service:

> *Internet access is not one-way and general, but interactive and individual beyond the "subscriber interaction" contemplated by the statute.* Accessing Web pages, navigating the Web's hypertext links, corresponding via e-mail, and

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[4] Subpart (A) is mandatory because subpart (B) includes the qualifier "if any" to modify subscriber interaction. Therefore, the content in subpart (B) is optional. 47 U.S.C. § 522(6)(B).

> participating in live chat groups involve two-way communication and information exchange unmatched by the act of electing to receive a one-way transmission of cable or pay-per-view television programming. *And unlike transmission of a cable television signal, communications with a Web site involve a series of connections involving two-way information exchange and storage, even when a user views seemingly static content.*

AT&T v. City of Portland, 216 F.3d 871, 876-877 (9th Cir. 2000) (emphases added).[5]

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[5] The Eastern District of Virginia's conclusion that Internet access delivered over cable infrastructure constitutes a "cable service" is incorrect because it failed to take this fact into account. *MediaOne Group, Inc. v. County of Henrico*, 97 F.Supp. 712, 715 (E.D. Va. 2000) *appeal pending* No. 00-1680 (L) (4th Cir. oral argument held Sept. 27, 2000). The Eastern District found that the Internet access at issue in that case is a "high-speed, *interactive* modem service, a *two-way interactive* offering that includes ... connectivity between a cable operator and a subscriber, access to the Internet, *interactive content* and programming, menus, navigational aids, *electronic mail*, access to newsgroups, a web browser, hosting and other features." 97 F.Supp. at 713 (emphases added). Despite the fact that these features clearly violate the statute's one-way limitation, the District Court held in conclusory terms that the service fell within the definition of a "cable service." *Id.* at 715. Ironically, the Court also appeared to come to the self-contradictory conclusion that Internet access via cable infrastructure also includes a telecommunications component. *Id.* at 714.

Because it is not "one-way," Internet access cannot be a "cable service."

B. Internet Access Qualifies as Neither "Video Programming" Nor "Other Programming Service."

Even if one were to ignore the statute's "one-way" requirement, *see supra* n.4, Internet access does not fall within the definition of "video programming" or "other programming service."

The Act defines "video programming" as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(20). The FCC squarely held that Internet access does not qualify as video programming. *Internet Ventures, Inc. and Internet On-Ramp, Inc., Memorandum Opinion and Order*, 15 FCC Rcd. 3247, 3253-54 (2000).

The Act defines "other programming service" as "information that a cable operator makes available to all subscribers generally." 47 U.S.C. § 522(14). The only information that a cable company "makes available to all subscribers generally" is whatever proprietary content it produces and publishes on its own web pages, home page, or through licensing agreements. No matter how extensive this offering may be, it is an infinitesimal fraction of the information available over the Internet. The vast majority of non-proprietary Internet content is chosen individually by the user. The cable operator does nothing to provide such individualized information "to all subscribers generally."

In short, providing a telecommunications *link* to information is not the same as providing the information itself.

Some cable operators have argued to the contrary, that merely providing access to the Internet makes information available "to all subscribers generally." Such a claim proves too much. As the FCC explained when it submitted an *amicus curiae* brief to the Ninth Circuit in *AT&T v. City of Portland*:[6] "*Under this broad statutory interpretation, however, 'other programming service' would arguably include any transmission capability that enables subscribers to select and receive information, including basic telephone service.*" *Amicus Curiae* Brief of the Federal Communications Commission at 23-24, *AT&T v. City of Portland*, 216 F. 3d 871 (9th Cir. filed Aug. 16, 1999) (No. 99-35609) (emphasis added).[7]

Moreover, review of the meaning of "other programming service" in context supports the conclusion that it does not include Internet access. As the Eleventh Circuit noted, the definition of "other programming service" has remained unchanged since it was first enacted. *Gulf Power*, 208 F.3d at 1277; Gov't Pet. App. at 29a. And extensive legislative history

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[6] Citizen *amici* do not suggest that this Court afford deference to this or any litigation positions of agency counsel, *Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 212, 109 S.Ct. 468, 473-74, 102 L.Ed.2d 493 (1988). Rather, CU, *et al.*, cite it as persuasive argument.

[7] Not only would obliterating the distinction between "cable service" and "telecommunications service" wreak havoc on the Act, but other changes made to the 1996 Act demonstrate an intent to maintain a distinction between the services. *See* Earl W. Comstock and John W. Butler, *Access Denied: The FCC's Failure to Implement Open Access to Cable As Required by the Telecommunications Act*, 8 CommLaw Conspectus 5, 19-21 (2000).

powerfully supports the conclusion that the term "cable service" did not include any interactive service that could now be considered a component of Internet access when it adopted the definition.[8]

C. The Addition of "Or Use" By the 1996 Act Does Not Fundamentally Change the Definition of "Cable Service."

The cable industry and an FCC staff report have hypothesized that Congress' insertion of the words "or use" into the definition of "cable service" in 1996, Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 149-151, somehow expanded that definition to cover Internet access. *See, e.g,* Comments of the National Cable Television Association in FCC GEN Docket 00-185, in FCC GEN Docket 00-185, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities* (filed Dec. 1, 2000) at 6-7; Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*, Federal Communications Commission OPP Working Paper No.

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[8] The House Report accompanying the 1984 Cable Act extensively considered the outer limits of the term "cable service" as it related to interactive services. It stated: "services providing subscribers with the capacity to engage in transactions, or to store transform, forward, manipulate, or otherwise process information or data would not be cable services." H.R. Rep. No. 98-934, at 42-43 (1984). It explicitly excluded from "cable service" the following: "shop-at-home and bank-at-home services, electronic mail, one-way and two-way transmission [of] non-video data and information not offered to all subscribers, data processing, video conferencing, and all voice communications." *Id.* at 44.

30 at 82-83 (1998).[9]

This "or use" argument is without merit. As a matter of statutory construction, the textual analysis included above forecloses the possibility that Internet access is a "cable service" because it does not alter the requirements that a "cable service" be one-way and either meet the definition of "video programming" or "other programming service."

The "or use" language added in 1996 is found in subpart (B) of the statutory definition. Subpart (B) includes within the "cable service" definition "subscriber interaction, if any, which

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[9] Citizen *amici* note that both courts and parties considering this matter have often misunderstood the authority of Commission staff reports. *See, e.g., Comcast Cablevision of Broward County, Inc. v. Broward County, Florida*, 124 F.Supp.2d 685, 687-89 (S.D. Fla. 2000) *appeal pending* No. 00-16507-GG (11th Cir. docketed Dec. 13, 2000). Such reports are the opinion of the author or authors alone, are not based on agency regulation, ruling, or administrative practice, and thus do not merit *Chevron* deference. *See Bowen v. Georgetown University Hosp.*, 488 U.S. 204, 212, 109 S.Ct. 468, 473-74, 102 L.Ed.2d 493 (1988); *Serono Laboratories, Inc. v. Shalala*, 158 F.3d 1313, 1221 (D.C. Cir. 1998) ("*Chevron* deference is owed to the decisionmaker authorized to speak on behalf of the agency, not to each individual agency employee.") As stated in the disclaimer to the Esbin paper, "[t]he analyses and conclusions in the Working Paper Series are those of the authors and do not necessarily reflect the view of other members of the Office of Plans and Policy, other Commission Staff, or the Commission itself." Esbin at cover. They can, however, provide useful analysis in the same manner as law review articles, and are used for that purpose herein.

is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 522(6). Thus, "or use" explicitly modifies "such video programming or other programming service." And, as discussed above, these services are limited in subpart (A) to "one-way" transmissions.

Thus, the statutory text contemplates, and always contemplated, limited subscriber interaction with programming, but *only to utilize a one-way programming service*.[10] The amendment altered the acceptable *goal* of a subscriber when he

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[10] For example, when the definition was first adopted in 1984, the accompanying House Report specifically pointed to inclusion of electronic program guides for pay-per-view video services, but ruled out more complex interactivity, stating:

> The Committee intends that the interaction permitted in a "cable service" shall be that required for the retrieval of information from among a specific number of options or categories delineated by the cable operator or the programming service provider. Such options or categories must themselves be created by the cable operator or programming service provider and made generally available to all subscribers. By contrast, interaction that would enable a particular subscriber to engage in the off-premises creation and retrieval of a category of information would not fall under the definition of cable service.

H.R. Rep. No. 98-934, at 42-43 (1984).

or she interacts with video and other programming. The subscriber may now interact with cable programming to "use," as well as to "select," that programming. *Gulf Power*, 208 F.3d 1263, 1277; Gov't Pet. App. at 29a. But allowing a subscriber to *use* a one-way service, as well as to *select* a one-way service, does not transform a one-way service into an interactive one.

Because the statutory text is unavailing, proponents of this theory attempt to supersede it with a single, ambiguous sentence from the legislative history. This sentence states:

> The conferees intend the amendment to reflect the evolution of cable to include interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services.

S. Conf. Rep. No. 104-230, at 169 (1996); H.R. Conf. Rep. No. 104-458, at 169 (1996).

This statement does not reflect a clear intent to expand the existing definition of "cable service" beyond its limit. It shows that under some circumstances subscriber interaction would qualify as a "cable service," however it does not show that *any* interaction between a subscriber and video or other programming, no matter how significant, is now included within the "cable service" definition. For example, a cable company could offer a video game channel that would allow a subscriber to download and play certain games, but that would provide no other access to the Internet or any other information. Such a service would likely fall under the new "cable service" definition, but not the previous one.

To the extent that the history reflects an intent beyond the change reflected in the text, it is impotent. The amendment

did not alter the fundamental components of "cable service," regardless of whether the conferees intended to do so.[11] Legislative history may not expand the text beyond its meaning. *Circuit City v. Adams*, No. 99-1379, slip. op at 12, 2001 WL 273205, at *9 (U.S. Mar. 21, 2001) (citing *Ratzlaf v. United States*, 510 U.S. 135, 147-48; 114 S.Ct. 655, 662; 126 L.Ed.2d 615 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear")).

Moreover, as the Eleventh Circuit found below, the legislative history reveals—if it reveals anything—that this change "was minor in both language and intent." *Gulf Power*, 208 F.3d at 1276; Gov't Pet. App. at 28a. The legislative history does not support "a major statutory shift" or a "radical[] expan[sion]" of the definition "from a video base to an all-interactive-services base." *Id.* at 1276-77; *see also Whitman v. American Trucking Ass'n, Inc.*, No. 99-1257, slip. op. at 7, 121 S.Ct. 903, 910 (U.S. Feb. 27, 2001) (Congress "does not ... hide elephants in mouseholes").

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[11] As explained in notes 8 and 10, *supra*, as of 1984 "cable service" clearly did not include fully interactive functionalities. Because the prior definition is clear, and because the change in 1996 is so small, and does not alter the term "subscriber interaction," the minor change in 1996 reinforces the conclusion that "cable services" do not include Internet access.

II. Regulating Internet Access as a "Cable Service" Will Endanger the Internet's First Amendment Protection.

A. The Value of the Internet, and the Source of its First Amendment Protection, Lies in Its Freewheeling, Open Nature.

The Internet is a unique tool in the history of communication: it allows users a virtually unlimited ability to both produce and receive speech. As such, it receives the highest First Amendment protection. *Reno v. ACLU*, 521 U.S. 844, 870, 117 S.Ct. 2329, 2344. These characteristics distinguish the Internet from other media that the government may regulate more intrusively. *Id.*, 521 U.S. at 868-69, 117 S.Ct. at 2343. As this Court observed, "[n]o single organization controls any membership in the Web, nor is there any centralized point from which individual Web sites or services can be blocked from the Web." *Id.*, 521 U.S. at 853, 117 S.Ct. at 2336.

Because the Internet is "open, decentralized and competitive" it also serves consumers and promotes entrepreneurship:

> Companies ... can develop and distribute innovative applications that spur usage, without owning any network infrastructure. Service providers must continually offer better pricing, services and support to win users' business.

Kevin Werbach, *The Architecture of the Internet 2.0*, Release 1.0 (Feb. 19, 1999), at 1.

The Internet's signal characteristic has been open entry. Openness lowers entry barriers and facilitates instant access to

both the marketplace of ideas and of commerce. This network of networks also creates communities of common concern, locally and internationally.

Openness, however, is a product of legal and technical choices. It is not "natural" or immutable. Lawrence Lessig, *Code and Other Laws of CyberSpace* 6 (Basic Books 1999) ("We can build, or architect, or code cyberspace to protect values that we believe are fundamental, or we can build, or architect, or code cyberspace to allow those values to disappear."). As described below, if Internet access via cable infrastructure is regulated as a "cable service," the defining characteristics of the Internet will be lost.

B. If Internet Access is Classified as a "Cable Service," Cable Operators Could Legally Exercise Control Over Internet Content.

The openness and diversity of the Internet evaluated in *Reno* is largely the result of the legal and regulatory framework governing the networks over which it flowed. That Internet was almost exclusively accessed via telephone lines, which are regulated under the common carriage portions of the Communications Act. The Act requires common carriers to serve all customers on a nondiscriminatory basis. 47 U.S.C. §§ 201, 202. Common carriers may not control or alter the content carried over their infrastructure. 47 U.S.C. § 153(43); Jason Oxman, *The FCC and the Unregulation of the Internet*, Federal Communications Commission OPP Working Paper No. 31 at 10 (1999). The FCC explicitly maintained these obligations on telecommunications providers, even as it "unregulated" the data processing industry whose content flowed over the network. Oxman at 9-11.

Maintaining the open and nondiscriminatory nature of

networks that transmit Internet data is essential for preserving First Amendment values. The U.S. District Court for the District of Columbia found just such a connection when it considered the FCC's rules "unregulating" data processors. *United States v. Western Electric Co., Inc.*, 673 F.Supp. 525 (D.D.C. 1987) (Greene, J.). The Court concluded that "[c]ontrol by one entity of both the content of information and the means of its transmission raises an obvious problem" that would "enable [the network provider] to disadvantage and discriminate against rival[s]" and "thus to pose a substantial threat to the First Amendment diversity principle." *Id.* at 586. *See also United States v. AT&T*, 552 F.Supp. 131, 184-85 (D.D.C. 1982) *aff'd sub nom Maryland v. United States*, 460 U.S. 1001 (1983); Ithiel de Sola Pool, *Technologies of Freedom* 106 (Harvard University Press 1983) (the nondiscrimination obligation of common carriers is a central element to civil liberty, analogous to First Amendment protection).

The cable television model is very different. While government may, under some circumstances, regulate cable television operators' editorial decisions, *see Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994); *see also Denver Area Educ. Telcom. Consortium v. FCC*, 518 U.S. 727, 116 S.Ct. 2374, 135 L.Ed.2d 888 (1996), they generally retain full power to determine what does—and does not—appear on video channels they control, 47 U.S.C. § 541(c). As a result, Congress has found it necessary to inject diversity into cable TV service offerings, *inter alia*, to assure that political candidates obtain "equal opportunities" to respond to political appearances, 47 U.S.C. §§ 315(c)(1)(A)-(B); to insure carriage of over-the-air TV stations, 47 U.S.C. §§ 534-35, and to reserve channel capacity for "leased" and "PEG" access, 47 U.S.C. §§ 531-32.

C. Technology Capable of Subtly Controlling Internet Content Is Available to Cable Operators, and Cable Operators are Likely to Deploy It.

New developments in network management technology permit cable operators to favor the content and technology of their business partners. Cable operators have a clear financial incentive to take advantage of this technology.

Cable companies will be able to discriminate against competing content. For example, Cisco Systems, the leading Internet hardware supplier, promises cable operators "absolute control" over content delivery, *see Controlling Your Network—A Must for Cable Operators* at 3 (Cisco Systems 1999). Cisco's promotional materials advise operators that it can apply technological controls to restrict, slow down and/or redirect incoming data and as well as subscribers' outgoing messages. *Id.* at 5. It also stated, "[a]t the same time you could promote and offer your own or partner's services with full-speed features to encourage adoption of your services ...." *Id.*

> This technology is subtle and precise. It can:
>
> ...isolate network traffic by the *type of application*, even down to *specific brands*, by the interface used, *by the user type and individual user* identification, or by the *site address*.

Id. (emphases added).[12]

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[12] The technology described above is only one of the many ways in which the characteristics of the Internet celebrated in *Reno* may be fundamentally altered. For a discussion

The danger that this technology will be used to limit expressive speech and competition on the Internet is not hypothetical. For example, cable executives often describe their vision of these service offerings as "walled gardens" that will keep customers within a confined area of the Internet. While in these gardens:

> customers ... will be able to venture into the vast world of the Internet, but will likely have to work at it .... They will be encouraged instead to stay within the offerings they are presented, [by] companies that have cut deals for eyeballs [advertising customers] with AT&T.

Rebecca Cantwell and Mindy Charski, *An Octopus' Garden*, Interactive Week, Dec. 11, 2000, at 30.

In the view of John Malone, a Director of AT&T and its single largest shareholder, "[t]he big question is, who owns the customer. .... In a cablecentric world, the cable operator is the retailer, and everyone else is a wholesaler to the cable operators." *Id.*; *see also* Kenneth Auletta, *How the AT&T Deal Will Help John Malone Get Into Your House*, The New Yorker, Jul. 13, 1998, at 13.

The FCC has confirmed the dangerous implications of the combination of technological capability and financial incen-

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of other technologies used to discriminate against Internet content via cable infrastructure, *see* Brief for *Amici Curiae* Virginia Citizens Consumer Council, *et al.*, *MediaOne Group, Inc. v. County of Henrico,* No.00-1680 (L) (4th Cir. filed July 10, 2000) available at http://www.mediaaccess.org/filings/index.html#henricobrief.

tive in its review of the AOL/Time Warner merger and prohibited the merged entity from discriminatory conduct. Specifically, the FCC found the merged entity would have the incentive to discriminate against other ISPs, and that technologically it would be able to "limit the online features and functionalities of unaffiliated ISPs or ... degrade their quality of service, conceivably in ways that would escape easy detection." *AOL/Time Warner Merger Order* at ¶¶ 86, 87.[13]

Although it refused to address the question of whether Internet access via cable infrastructure is a "cable service," the Commission imposed a series of conditions on the AOL/Time Warner merger to prevent it from leveraging its power over Internet content, including prohibitions on technical discrimination against competing ISPs and on contractual limits on content provided by other ISPs. *Id.* at ¶ 126.

If the cable television model is successfully deployed, a cable line and a computer will not be enough to become a full participant on the Internet. Instead, a contractual agreement with the cable infrastructure owner, typically involving a significant financial exchange, will be a necessary precondition to receiving the full attention of other users seeking information.

The regulatory environment in which these services and technologies will be developed will determine whether the Internet maintains its capacity to transmit vibrant, open discourse, or whether it will be transformed into a closed and controlled private shopping mall where individuals may under-

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[13] The capabilities described in the Cisco paper, and other similar technological capabilities, formed a basis for the record in the FCC's review of the AOL/Time Warner merger. *AOL/Time Warner Order* at n.275.

take activities that further the goals of its financial backers, but may not engage in the vigorous debate that provides the foundation for this country's democratic principles.

CONCLUSION

If this Court's analysis of Section 224 requires it to reach the question, citizen *amici* request this Court to determine that Internet access delivered via cable television infrastructure is not a "cable service." Under that circumstance, citizen *amici* endorse the analysis of *amicus curiae* Earthlink, Inc., concluding that Internet access necessarily includes a telecommunications service. CU, *et al.*, encourage this Court to adopt that analysis, or, remand this question to the FCC and require the agency to consider and resolve the question.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Petitioner,

v.

GULF POWER COMPANY, *et al.*,
Respondents.

FEDERAL COMMUNICATIONS COMMISSION AND
THE UNITED STATES OF AMERICA,
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v.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE UNITED STATES TELECOM ASSOCIATION AND VERIZON COMMUNICATIONS AS *AMICI CURIAE* IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

This brief addresses the question whether the Pole Attachment Act, 47 U.S.C. § 224, applies to attachments by cable operators used to provide both traditional cable television programming and high-speed Internet access.

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BRIEF FOR THE UNITED STATES TELECOM ASSOCIATION AND VERIZON COMMUNICATIONS AS *AMICI CURIAE* IN SUPPORT OF REVERSAL

INTEREST OF *AMICI CURIAE*[1]

The United States Telecom Association (USTA) is a trade association representing more than 1,200 companies that

[1] Letters from the parties consenting to the filing of this brief have been lodged with the Clerk. *Amici* state that no person other than *amici*, their members, and their counsel authored the brief in whole or in part or made a monetary contribution to its preparation or submission.

provide telephone and Internet services, among other products and services. Verizon Communications, a corporation formed by the merger of Bell Atlantic and GTE, is the nation's largest local telephone company, a provider of high-speed connections used for Internet access, and a provider of Internet access services. USTA's members, including Verizon, own a substantial number of utility poles, ducts, conduits, and rights of way to which cable operators make attachments to provide traditional cable services and high-speed connections used for Internet access. Many of USTA's members, including Verizon, provide high-speed Internet access over their own telecommunications facilities (which are attached to poles, ducts, conduits, and rights of way) in direct competition with cable operators (which attach their wires to the same poles, ducts, conduits, and rights of way). *Amici* have an interest in ensuring that cable operators pay proper rates under the Pole Attachment Act, 47 U.S.C. § 224 [hereafter cited simply as "Section 224"]. More particularly, *amici* have an interest in seeing that cable operators are treated, under the Pole Attachment Act, the same as their telecommunications-services rivals when competing for customers seeking high-speed connections for Internet access. This brief addresses only the first question presented for review, concerning cable systems; it does not address the question concerning attachments by providers of wireless telecommunications services.

STATEMENT

The pertinent facts about the "high-speed Internet access" that is the topic of the first question presented are straightforward. Basic descriptions of the ways in which cable companies and telephone companies supply high-speed connections for Internet access may be found in two reports of the Federal Communications Commission (FCC or Commission): *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*,

Second Report, CC Docket No. 98-146, at ¶¶ 28-40 (Aug. 21, 2000) ["*Second Advanced Services Report*"]; *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, Report, CC Docket No. 98-146, 14 FCC Rcd 2398, at ¶¶ 34-61 (Feb. 2, 1999).

To reach the Internet, residential customers must establish two physical communications connections. *First*, they must establish a connection between their homes and the facilities of an Internet service provider (ISP). Customers purchasing traditional low-speed or "narrowband" Internet service commonly rely on their telephone lines to make this connection, using modems in their computers to dial in to another bank of modems hosted by their ISP.[2] This bank of modems is known as an ISP's "point of presence." *Second*, customers must obtain service from an ISP, such as America Online or Verizon Online or Earthlink or Microsoft Network, to establish a connection between the local ISP point of presence and the routers and other facilities that, connecting to other ISPs and end users, make up the Internet. Although some ISPs offer customers additional services—for example, access to unique content, private e-mail accounts, chat rooms, instant messaging, search tools, and the like—the essential function of the ISP is to offer a connection from their points of presence to the Internet.

A growing number of consumers are seeking to connect to the Internet at higher speeds than those available through traditional dial-up services. Such customers likewise require two physical connections to reach the Internet: a connection between their homes and an ISP's point of presence, and a

---

[2] The term "narrowband" is used to indicate that a relatively narrow range of frequencies is used for the communication. One way of increasing transmission speed, *i.e.*, the amount of information conveyed per second, is by increasing the range of frequencies in use, or broadening the band. "Broadband," therefore, is used to refer to high-speed transmissions.

connection between that point of presence and the Internet. The high-speed connections are commonly referred to as "broadband." *See* note 2, *supra*. Today, cable operators using their coaxial cable and fiber optic facilities, and not local telephone companies using the traditional copper loop, are the dominant providers of broadband connections from residences to ISPs' local points of presence. *See Second Advanced Services Report* at ¶ 190.

In a typical configuration, cable customers, to connect to an ISP's point of presence over a cable network, use cable modems installed in their equipment at home to send data signals to a routing device—known as a "Cable Modem Termination System" or "CMTS"—located in the cable operator's "headend" facilities. (A "headend" is a facility within the cable network that receives traditional video programming from satellites and distributes it to customers over the cable network.) These data signals travel over the same wires used by cable operators to deliver video programming. The wires, attached to poles, ducts, conduits, and rights of way, typically run from every home in a cable operator's service area back to a series of headend facilities. At the headend, the CMTS receives the data signals from customers and routes them "upstream" to the ISP's point of presence. The CMTS also transmits data in reverse: it receives data from the Internet (through the ISP's local facility) and sends such data "downstream" to customers' homes. Cable operators allocate the available frequency range on their wires to allow both video programming and broadband data delivery.

In traditional cable service, cable companies supply all of the available programming, with customers merely selecting among programming options compiled by the cable operator (exercising its editorial discretion, subject to legal requirements such as "must carry" laws). In contrast, cable-delivered broadband Internet access allows users to interact with any source connected to the Internet and choose, without

editing by the cable company, the unique information they wish to send or receive. Thus, although most cable operators have been tying their affiliated ISP to their broadband transmission service, customers are free to bypass completely the content provided by the affiliated ISP. As the National Cable Television Association has explained:

> Cable modem service guarantees subscribers an open environment through which they can reach any content available on the World Wide Web. Cable operators do not restrict services that can be provided by online service providers and cable modem service subscribers are able to access other ISPs or online services without having to view the content provided by the cable operator if they so choose. Many cable modem service subscribers use the service to access the proprietary content provided by the Microsoft Network, Yahoo, Amazon.com, and myriad others.

Comments of the National Cable Television Association to the FCC, *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Gen. Docket No. 00-185, at 39 (filed Dec. 1, 2000) (hereafter *NCTA Comments*).

Local telephone companies offer a directly competing broadband access service to connect customers to an ISP's local point of presence. This service is offered over the telephone company's traditional wires—wires that are attached to the same poles, ducts, conduits, and rights of way to which cable operators attach their wires. The service, known as "Digital Subscriber Line" or "DSL" service, uses "specialized electronics at the customer's premises and at a telephone company's central office . . . to transmit high-speed data signals over copper cables." *In re Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and

Order, CC Docket No. 99-295, 15 FCC Rcd 3953, at ¶ 250 (Dec. 22, 1999), *aff'd, AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000). To connect to an ISP's local facility over a DSL network, customers use a transceiver (similar to a cable modem) to send signals to a routing device in the phone company's central office. Those data signals, while carried on the same copper wires used to deliver voice service, use a separate part of the wire's available frequency range so as not to interfere with customers' ability to make telephone calls at the same time they are using DSL service. At the central office, a "Digital Subscriber Line Access Multiplexer" or "DSLAM" performs a function like the CMTS in a cable broadband system: it receives customers' data transmissions and routes them "upstream" to the ISP's point of presence, and it routes transmissions received from the Internet (through the ISP) "downstream" to customers' homes. DSL customers, like cable modem customers, are able to use their broadband connections to transmit data to and from any destination on the Internet.

Thus, regardless of what entity is providing it, residential high-speed Internet access typically requires two separate steps. The first is transmission over a pipeline from a customer's home to an ISP's point of presence, provided by a cable or phone company over wires attached to poles, ducts, conduits, and rights of way. The second is a service delivered by an ISP (whether or not affiliated with the pipeline provider) to provide the connection between the point of presence and the Internet (along with any other services the ISP may wish to provide, such as proprietary content, e-mail accounts, or search tools).

SUMMARY OF ARGUMENT

Contrary to the Eleventh Circuit's conclusion, Section 224 provides for rate regulation of an attachment by a cable

operator of facilities used to provide both cable service and high-speed Internet access. Section 224(b), even if it allows no other rate regulation, provides for rate regulation of the services addressed in the specific subsections addressed to rate regulation, *i.e.*, Sections 224(d) and (e). Under Section 224(e), it is clear that any attachment used to provide a telecommunications service is subject to the rates the Commission has adopted, as required, pursuant to that subsection. High-speed Internet access provided by a cable operator includes a telecommunications service and is therefore covered by Section 224(e) and, hence, by Section 224(b).

Section 224(e) by its terms declares that it covers any attachment used to provide telecommunications services, without any exception for situations in which the provider is a cable operator also using the attachment for cable service. Subsection (d)(3), which contemplates such dual-use attachments, by its language confirms that subsection (e) applies to a cable operator's provision of telecommunications services over dual-use wires. The legislative history, moreover, is explicit in stating precisely such a congressional intent to apply the telecommunications-service rate to such dual-use attachments. And this result is the only one consistent with Congress's intent to ensure nondiscriminatory pole-attachment rates for all providers of telecommunications services. Only applying the more fully compensatory rate of subsection (e), rather than allowing the much less compensatory rate of subsection (d) for one class of telecommunications-service attachments (those also used to provide cable service), fulfills that policy.

Subsection (e) applies when a cable operator uses an attachment to provide customers high-speed Internet access, because it is using the attachment to provide telecommunications services. Whatever else the cable operator is doing, it is serving as a basic transparent conduit

from a user's residence to the ISP point of presence (and the Internet beyond), and that service is a telecommunications service under the express statutory definition. That transparent transport service, moreover, is not a cable service. Indeed, even a cable operator's offering of a traditional ISP's service—the connection from point of presence to the Internet, along with such services as e-mail, home pages, search tools, and the like—is not a cable service. Similarly, when a cable operator offers such a traditional ISP service, that service is an "information service," which, under the FCC's orders, is separate from and additional to the telecommunications service that connects the customer to the ISP. In short, cable-provided high-speed Internet access service includes a telecommunications service, and the dual-use attachments at issue in these cases—because they provide high-speed Internet access—are therefore covered by Section 224(e) and hence Section 224(b).

ARGUMENT

SECTION 224 APPLIES TO REGULATE THE RATE THAT CABLE OPERATORS MUST PAY FOR ATTACHMENTS USED TO PROVIDE BOTH TRADITIONAL CABLE SERVICE AND HIGH-SPEED INTERNET ACCESS

The first question on which this Court has granted certiorari is whether Section 224 applies to regulate the rate charged for pole attachments by cable operators for facilities used for dual purposes—to provide traditional cable services and also to provide high-speed Internet access. The Eleventh Circuit held that such attachments fall outside the particular subsections addressed to rates (*i.e.*, subsections (d) and (e)) and, for that reason, are not subject to Section 224. Pet. App. 26a-32a.[3] Petitioners challenge the Eleventh Circuit decision,

[3] "Pet. App." here refers to the appendix to the Government's petition, in case No. 00-843.

but not by questioning the Eleventh Circuit's conclusion that subsections (d) and (e) are inapplicable. Rather, petitioners skip that question and argue that subsection (b) gives the Commission rate-regulatory authority unconstrained by the scope of subsections (d) or (e) and that this broader subsection (b) authority reaches the dual-use attachments at issue even if they are outside subsection (d) and subsection (e).

Amici instead challenge the Eleventh Circuit on the ground that the Eleventh Circuit erred in concluding that the dual-use attachments fall outside Section 224(e). As this brief shows, the Commission's own orders make clear that high-speed Internet access service by cable operators includes a telecommunications service and thus squarely comes under the rate regime required by and established pursuant to subsection (e). This conclusion requires an affirmative answer to the cable-related question on which this Court has granted certiorari: Section 224(b) covers the dual-use attachments because Section 224(e) does.

Decision on this basis, as shown below, involves a systematic application of the pertinent statutory provisions and definitions, and it takes the structurally more natural approach of asking whether the attachments at issue are within one of the specific subsections that—in contrast to subsection (b), which generically covers "rates, terms, and conditions"—squarely deals with rates. This approach to answering the question presented thus avoids the potentially broader argument of petitioners that subsection (b) provides authority to regulate rates over and above the authority granted in the two subsections specifically addressing rates. (As the Eleventh Circuit pointed out, Pet. App. 30a n.32, no such statutory question was presented by Section 224 before the 1996 amendments, when *Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993), was decided.) Petitioners' argument need not be addressed to resolve the cable issue in

these cases or to resolve the wireless-attachment issue (the Commission expressly concluded that Section 224(e) itself applies to wireless attachments, *see* Pet. App. 94a). Decision of the question presented on the ground advanced by *amici*, moreover, would directly further the clear statutory policy: ensuring application of the same subsection (e) rate regime to all providers of telecommunications services.

A. Section 224(e) Applies Whenever An Attachment Is Used To Provide Telecommunications Services, Regardless Of What Other Services It Is Used To Provide

1. The Pole Attachment Act, 47 U.S.C. § 224, requires cable operators to pay the rate established in Section 224(e) when using their attachments to provide a telecommunications service along with cable service. Section 224(e) by its terms states, using the mandatory language of "shall," that the rules promulgated by the Commission under that subsection "shall . . . govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services." § 224(e)(1). By express statutory definition, moreover, a "telecommunications carrier" includes "any provider of telecommunications services." 47 U.S.C. § 153(44). The language of Section 224(e)(1), therefore, by its terms mandates application of the subsection (e) rules to attachments by a cable operator whenever such attachments are used to provide telecommunications services. That clear command makes no exception for an attachment that is also being used to provide cable service.[4]

[4] An attachment by a cable operator used to provide telecommunications services is clearly covered as a "pole attachment" under Section 224(a)(4) as an "attachment by a . . . provider of telecommunications service" (§ 224(a)(4)) because the cable operator becomes such a provider when providing such services. That is so irrespective of whether such an attachment also fits within Section 224(a)(4) as an "attachment by a cable television system." § 224(a)(4).

In *Texas Utils. Elec. Co.*, 997 F.2d at 930, the D.C. Circuit noted the awkwardness of the language, "attachment *by* a cable television system," given the usage of "system" elsewhere in the Communications Act to refer to the set of facilities, not the operator of the facilities. 47 U.S.C. § 522(7). That awkwardness was heightened in 1996, when the "cable system" definition as a set of facilities was presumptively extended to the Act as a whole (47 U.S.C. § 153(7), incorporating 47 U.S.C. § 522 definition)) and "provider of telecommunications service" was added to Section 224(a)(4) in syntactic parallel to "cable television system." *See also* § 224(d)(3) (similar parallelism).

The language of Section 224(d)(3) confirms the application of subsection (e) when cable operators use their facilities, in part, to provide telecommunications services. Congress expressly recognized in several places in its 1996 enactment that cable operators would be "engaged in the provision of telecommunications services." 47 U.S.C. § 541(b)(3)(A); *see also* 47 U.S.C. § 522(7) (definition of "cable system," dating back to 1984, that acknowledges possibility of dual-use facilities, partly for cable service and partly for telecommunications services). Congress recognized this reality in Section 224(d)(3) specifically, and in so doing, confirmed the command of Section 224(e)(1) that the telecommunications-services rate applies to dual-use attachments.

Thus, Section 224(d)(3) first provides that the rate established under subsection (d)(1)—which is lower than the telecommunications-service rate of subsection (e), designed to be more equitable and compensatory, as noted below—applies when "any pole attachment [is] used by a cable television system *solely* to provide cable service." § 224(d)(3) (emphasis added). The provision then states that, "[*u*]*ntil* the effective date of the regulations required under subsection (e)"—the regulations governing telecommunications-services attachments, which had to be promulgated by

February 1998 and take effect in February 2001—the subsection (d) rate "shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier . . . to provide any telecommunications service." § 224(d)(3) (emphasis added). The natural message of these two sentences is straightforward: attachments used *solely* for cable service would continue under the subsection (d) rate, while dual-use attachments would become subject to the subsection (e) rate once the Commission's regulations under that subsection took effect.

2. The intended priority of subsection (e) over subsection (d) for dual-use attachments is made explicit in the relevant legislative history. The two-part rate structure that Congress added to the Pole Attachment Act in 1996 appeared first in the 1995 House bill, though the two parts were presented in the reverse order from the order ultimately adopted: an amended subsection (d) provided first for a rate applicable to "all providers of telecommunications services, including such attachments used by cable television systems to provide telecommunications services," then exempted from that rate "a cable television system that solely provides cable service," such system remaining entitled to the lower pre-amendment rate. H.R. Rep. No. 104-204, Part I, 104th Cong., 1st Sess. 79-81 (1995); *see* 141 Cong. Rec. H8425, H8434 (Aug. 4, 1995) (bill as enacted by House). Dual-use attachments by cable operators were thus expressly subject to the telecommunications-service rate. The committee explanation confirmed the point, stating that if "a company seeks pole attachment for a wire used solely to provide cable television services . . . , that cable company will continue to pay the rate authorized under current law," but if "a cable television system also provides telecommunications services, then that company shall instead pay the pole attachment rate prescribed by the Commission pursuant to the fully allocated cost formula" required for telecommunications-service providers. H.R. Rep. No. 104-204, at 242.

The bill subsequently enacted by the Senate (a significant modification of the Senate committee bill, *see* S. Rep. No. 104-23, 104th Cong., 1st Sess. 40, 86-87 (1995)) contained the same two-part regime as the House bill but changed the order and paragraph structure to address attachments "solely to provide cable service" in a new subsection (d)(3) and "pole attachments by telecommunications carriers" in a new subsection (e). *See* 141 Cong. Rec. H9963-64 (Oct. 12, 1995) (version of S.652 reported to House). The conference committee used the Senate bill as a model, H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 207 (1996), changing (without remark) the Senate's subsection (e) language so that it would refer to "pole attachments used by telecommunications carriers to provide telecommunications services." § 224(e). The conferees said nothing whatever to indicate that they saw any substantive difference between the Senate and House versions with regard to the issue of which rate governed dual-use attachments by cable operators. And, in describing the House version, they expressly reiterated, with no indication of disapproval or departure, the House committee's explanation that if "a cable television system also provides telecommunications [in addition to cable service], then that company shall instead pay the pole attachment rate prescribed by the Commission" for telecommunications-service providers. H.R. Conf. Rep. 104-458, at 206.

3. The same conclusion follows from applying to dual-use attachments the fundamental congressional policy reflected in Section 224—and more generally in the 1996 Act, *see* Point B.1, *infra*—against discriminatory regulatory treatment of competitors based on what facilities they use. Specifically, Congress expressed a purpose in amending the Pole Attachment Act to ensure that cable operators would not have an unfair advantage over local telephone companies and other telecommunications carriers when using their cable networks to provide telecommunications services. Application of

subsection (e) to dual-use attachments is the only statutory construction that preserves, rather than undermines, that policy.

Thus, the rate set in subsection (d) requires a cable company to pay only for a share of total "operating expenses and actual capital costs" represented by the portion of the "usable" space—*e.g.*, the upper portions of a telephone pole—the cable company actually uses. That rate leaves the owner of the pole, duct, conduit, or right of way to pick up the share of costs represented not only by the space it actually uses for its attachments but by the unused portion of the usable space as well. Thus, for example, if the cable company uses one thirteenth of the usable space, the utility retains a twelve-thirteenths share of costs even if its attachments use no more space than the cable company's. *See* Pet. App. 7a & nn.8, 9. Cable operators paying the subsection (d) rate are therefore paying less than their share of total costs for the poles, ducts, conduits, and rights of way they use.

That deficiency is without competitive consequence when cable operators use their attachments "solely to provide cable service" (§ 224(d)(3)), because rivals to cable service (*e.g.*, satellite programming providers) have no directly comparable cost, not using the same poles, ducts, conduits, or rights of way. But when cable operators use their wires to provide telecommunications services in competition with local telephone companies and other telecommunications carriers, they derive a significant advantage from paying only the rate specified in subsection (d). If the poles, ducts, conduits, and rights of way are those of the local telephone company, for example, the subsection (d) rate effectively assigns all the unused share of the usable space to the telephone company, using that lop-sided assignment to allocate the costs. Cable operators have a measurable and unfair advantage in competition for customers of telecommunications services—

not only against the local telephone company but against other non-cable telecommunications-service providers subject to the higher subsection (e) rate, which apportions the full costs of the pole, duct, conduit, or right of way with greater (but not complete) equality among the several users, including the utility. *See* Pet. App. 65a-66a, 97a, 194a-199a; *id.* at 87a (the (e) rate is designedly higher than the (d) rate).

Congress recognized and targeted this discrimination in amending the Pole Attachment Act in 1996. The House Committee explained that the pre-1996 rate (still embodied in subsection (d)) "gives cable companies a more favorable rate for attachment than other telecommunications service providers"—a rate that had been "established to spur the growth of the cable industry, which in 1978 [the year the Pole Attachment Act was enacted] was in its infancy." H.R. Rep. 104-204, at 241. The Committee then added that the creation of a new fully compensatory rate was "intended to remedy the inequity for pole attachments among providers of telecommunications services." *Id.* The Conference Committee, again without indication of disapproval or departure, repeated the House Committee's expression of intent "to remedy the inequity of charges for pole attachments among providers of telecommunications services." H.R. Conf. Rep. No. 104-458, at 206. This is the precise inequity that would be created if one among the several providers of telecommunications services were treated more favorably just because it also was providing a cable service (where competitors do not have a higher share of the costs of using the very same poles, ducts, conduits, or rights of way). The congressional policy, as well as the statutory language and specific congressional intent, thus mandates application of subsection (e) to a cable operator's dual-use attachments.

B. Cable-Delivered High-Speed Internet Access Includes The Provision Of A Telecommunications Service

The Communications Act sharply distinguishes three categories of services provided by wire: telecommunications services, cable services, and information services. *See* 47 U.S.C. § 153(7) (cable service), (20) (information service), (43) (telecommunications), (46) (telecommunications service); *see also* 47 U.S.C. § 541(b) (distinguishing cable service from telecommunications services); *In re Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket No. 96-45, 13 FCC Rcd 11,830, at ¶ 39 (Apr. 10, 1998) (explaining that "telecommunications services" and "information services" are "mutually exclusive") ["*FCC Report to Congress*"]. The Commission's orders applying these statutory definitions compel the conclusion that a cable operator's offering of high-speed Internet access includes a separate "telecommunications service" and, at a minimum, is not solely a "cable service" or "information service." Accordingly, Section 224(e) applies to the dual-use attachments at issue in these cases.

1. The Communications Act defines a "telecommunications service" as a service, offered "for a fee directly to the public," and "regardless of the facilities used," that provides "transmission, between or among points specified by the user, of information of the user's choosing without change in the form or content of the information as sent and received." 47 U.S.C. §§ 153(43) & (46). Telephone service is the archetypal example of a telecommunications service because it allows users to direct unedited voice communications to other individuals. Cable operators are providing just such a service when they provide customers—members of the public served for a fee—high-speed Internet access, which includes unedited transport of information between the customers' homes and an ISP's point of presence (which in turn connects the customers to the Internet).

Thus, once the cable operator connects customers to their ISPs, the cable operator does no selection of the information transported between the customers' homes and the ISPs' facilities. Customers are in complete control of the information sent and received over the wires connecting their homes, through poles, ducts, conduits, and rights of way, with the ISPs and the Internet beyond. Cable operators transport information "of the user's choosing" when delivering e-mail, for example, or conveying data that a user sends to or receives from an Internet site (through the ISPs' facilities)—when reading judicial opinions on-line, purchasing a book on Amazon.com, bidding in an electronic auction on eBay, or participating in a chat-room discussion hosted by America Online. As the National Cable Television Association has explained, "[c]able modem service guarantees subscribers an open environment through which they can reach any content available on the World Wide Web." *NCTA Comments* at 39.

The FCC's own precedents compel the conclusion that cable operators are offering a telecommunications service when they provide high-speed Internet access over their cable wires. The FCC has repeatedly concluded that DSL service is a telecommunications service. *See In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Remand, CC Docket No. 98-147, 15 FCC Rcd 385, at ¶ 9 (Dec. 23, 1999) ("we reaffirm our prior conclusion that xDSL-based advanced services constitute telecommunications services"); *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, CC Docket No. 98-147, 13 FCC Rcd 24,012, at ¶ 36 (Aug. 7, 1998) [*Advanced Services Order*] (telephone companies are offering "a variety of services in which they use xDSL technology . . . to provide members of the public with a transparent, unenhanced transmission path"); *see also AT&T Corp. v. City of Portland*, 216 F.3d 871, 879 (9th Cir. 2000) ("the FCC regulates DSL service, a high-speed competitor to cable broadband, as an

advanced telecommunications service subject to common carrier obligations"). Cable-delivered high-speed Internet access includes a transparent high-speed transport service that directly competes with and is functionally indistinguishable from DSL service. As the FCC has stated, "if the same type of Internet access service is offered over cable systems as well as telephone networks, it is not readily apparent why the classification of the service should vary with the facilities used to provide the service." Brief of the FCC as *Amicus Curiae*, *City of Portland*, 2000 U.S. App. LEXIS 14383, at 25 (9th Cir.; filed Aug. 16, 1999).

Under the statutory definitions, it makes no difference whether the service uses coaxial cable, optical fiber, or copper wire. The Communications Act definition of "telecommunications service" expressly states that the term applies "regardless of the facilities used." 47 U.S.C. § 153(46). The FCC, for its part, has recognized "Congress's direction that the classification of a provider should not depend on the type of facilities used," adding: a "telecommunications service is a telecommunications service regardless of whether it is provided using wireline, wireless, cable, satellite, or some other infrastructure." *FCC Report to Congress* at ¶ 59. That conclusion is reinforced by the medium-neutrality policy embodied in the specific statutory provision promoting the deployment of "advanced telecommunications capability" (Telecommunications Act of 1996, § 706, 110 Stat. 153; 47 U.S.C. § 157 note), which is expressly defined "*without regard to any transmission media or technology*, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications *using any technology*." *Id.* § 706(c)(1) (emphasis added). Cable-offered high-speed Internet access service, like DSL service, is an example of such advanced services. *See Second Advanced Services Report* at ¶ 18.

The Telecommunications Act's repeated policy of neutrality among Internet access technologies thus requires classification of cable-delivered high-speed Internet access as a "telecommunications service." Because DSL and cable broadband services are competitively indistinguishable, and because the Act admits no distinction based on the facilities used, cable-delivered broadband *a fortiori* constitutes a telecommunications service. The Ninth Circuit recently confirmed this conclusion, holding that cable operators, by offering their subscribers "Internet transmission over [a] cable broadband facility," are "providing a telecommunications service as defined in the Communications Act." *City of Portland*, 216 F.3d at 878; *see also id.* ("The Communications Act includes cable broadband transmission as one of the 'telecommunications services' a cable operator may provide over its cable system.").

2. Cable operators offering high-speed Internet access are not offering what is "solely" a "cable service." § 224(d)(3). The Communications Act defines a "cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 522(6); *see* 47 U.S.C. § 153(7) (adopting Section 522(6) definition for Communications Act as a whole). Whatever that definition could encompass, it plainly cannot encompass the transparent transport service connecting a customer to an ISP of the customers' own choosing, without editorial interference by the cable operator. That service does not involve the cable operator's "programming" at all. For that reason alone, cable-offered high-speed Internet access service is, at a minimum, not "solely" a cable service.

Although that is enough to render Section 224(d) inapplicable, it is also clear that, even when the ISP service itself is considered, cable-delivered high-speed Internet

access is not "cable service." ISP service is in no way limited to "video programming," which encompasses only "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(20). As the FCC has concluded, "Internet access service generally consists of numerous distinct and related elements, such as access to personal, educational, informational, and commercial web sites; the ability to send and receive electronic mail; access to streamed video content; Internet video messaging and conferencing; and a host of other services both realized and forthcoming." *In re Internet Ventures, Inc.*, Memorandum Opinion and Order, File No. CSR-5407-L, 15 FCC Rcd 3247, at ¶13 (Feb. 18, 2000). ISP service, with its numerous services in no way "comparable" to traditional video programming, falls outside the definition of "video programming . . . contemplated by . . . the Communications Act." *Id.* ¶ 12.

Nor can the ISP-service part of high-speed Internet access over cable facilities constitute an "other programming service," which is limited to "information that a cable operator makes available to all subscribers generally." 47 U.S.C. § 522(14). Cable operators, insofar as they provide access to the Internet, enable their broadband customers to acquire a wide range of information that is not "available to all subscribers generally." A cable broadband customer is able to access e-mail that is written for, and delivered to, that customer alone. Such a customer is free to create and access a unique home page on a "portal" such as Yahoo!—a page that includes content organized in a format dictated and seen exclusively by that customer. A cable broadband customer can establish a specific identity with electronic merchants, such as Amazon.com, and as a result receive personalized content when accessing such merchant sites. In at least these ways, cable-delivered broadband access provides each customer exclusive use of personal information that the cable

operator does not make available to all of its subscribers. And such access is plainly not limited to "one-way" transmission, as the "cable service" definition requires. 47 U.S.C. § 522(6)(A). The Ninth Circuit summarized these basic differences:

> Internet access is not one-way and general, but interactive and individual beyond the "subscriber interaction" contemplated by the statute. Accessing Web pages, navigating the Web's hypertext links, corresponding via e-mail, and participating in live chat groups involve two-way communication unmatched by the act of electing to receive a one way transmission of cable or pay-per-view television programming.

City of Portland, 216 F.3d at 876. The two-way interactivity and customizing made inherent in use of the Internet disqualifies ISP service from being "cable service."[5] *See* Pet. App. 28a-29a.

In addition, the requirement that it is the cable operator who must be engaged in the "transmission" of a "programming service," along with the "subscriber interaction" needed to select or use such programming, takes ISP service—not *all* services providing information, but *Internet*-access service—outside the definition of "cable service." Before the 1996 Act, in *National Cable Television Ass'n v. FCC*, 33 F.3d 66 (D.C. Cir. 1994), the D.C. Circuit, relying on the "transmission" language as it had long been used in the cable provisions, upheld the Commission's interpretation of "cable service" as *not* covering a

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[5] *See* H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 41-42 (1984) ("[T]he definition of other programming service . . . may not include information that is subscriber-specific. If information transmitted on a cable system is made available only to an individual subscriber . . . , the transmission of this information is not a cable service."); *id.* at 42 ("All services offered by a cable system that go beyond providing generally-available video programming or other programming are not cable services.").

"transparent conduit" for content—even traditional video content—that is selected by an end user and that is originated by a third party, not by the cable operator. *Id.* at 71; *see id.* at 71-72 (going beyond deference to Commission, citing "[c]ommon usage," and concluding that it is "obvious" that "'transmitting' a video signal implies at least choosing the signal, or originating it"). Congress, in amending the definition of "cable service" in 1996, did nothing to alter that interpretation.[6] An ISP service by cable operators—insofar as it provides transparent unedited access to the Internet (rather than its own proprietary content)—is not a "cable service" for that reason.

3. Finally, cable-delivered high-speed Internet access does not fall within the Communications Act's definition of an "information service": "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20). Cable operators, of course, like DSL-providing telephone companies, may offer customers an ISP service, which is an "information service." *See FCC Report to Congress* at ¶¶ 33-52, 66. But they provide that service *along with* their telecommunications service, and, as the Commission's orders establish, the two services are statutorily distinct and cannot be conflated. The

[6] The 1996 conferees stated that, by adding the words "or use" to the definition of "cable service," they intended to bring in *at least some* "interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services" [the pre-1996 Commission-used name for what are now called "information services"]. H.R. Conf. Rep. 104-458 at 169. Even that statement (still less the statutory text) does not extend "cable service" to *all* information services, including ISP service providing access to (customized) content created and controlled by the end user and third parties, without interference by the cable operator. The conferees' statement is fully meaningful as a reference to proprietary content provided entirely by the cable operator.

Commission concluded when classifying DSL as a "telecommunications service": an "end-user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services separately: the first service is a telecommunications service (*e.g.*, the enhanced xDSL-enabled transmission path), and the second service is an information service, in this case Internet access." *Advanced Services Order* at ¶ 36. So, too, customers of cable operators, which have configured their cable Internet service to allow bypassing of the content and services offered by their affiliated ISPs, receive, at the least, a "transparent, unenhanced, transmission path" to independent ISPs. *Id.* The Eleventh Circuit's cursory analysis of this issue breaks down precisely because, in speaking simply of "Internet service" (Pet. App. 26a, 31a), it fails to differentiate between the two components of cable Internet service—a telecommunications service delivered over wires attached to poles, ducts, conduits, and rights of way, and an information service provided by the cable operator's affiliated Internet service provider.

The Ninth Circuit's analysis in *City of Portland* confirms the FCC precedents. As the Ninth Circuit concluded, cable modem service "consists of two elements: a 'pipeline' . . . and the Internet service transmitted through that pipeline." *City of Portland*, 216 F.3d at 878. To the extent that a cable operator makes available the service of an affiliated or exclusive ISP, "its activities are that of an information service. However, to the extent that" a cable operator provides its "subscribers Internet transmission over [a] cable broadband facility," it is "providing a telecommunications service as defined in the Communications Act." *Id.*

In short, even if cable broadband customers are compelled by the cable operator to pay for the affiliated ISP, they are also purchasing a telecommunications service. The dual-use

attachments used to provide that telecommunications service are covered by Section 224(e). They are, accordingly, subject to the rate-regulatory authority of the Commission under Section 224(b).

CONCLUSION

The judgment of the court of appeals should be reversed on the ground that Section 224(e) covers attachments used to provide both cable service and high-speed Internet access.

Respectfully submitted,

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IN THE

Supreme Court of the United States

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Respondents.

FEDERAL COMMUNICATIONS COMMISSION AND
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v.

GULF POWER COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF THE SITE OWNERS AND MANAGERS ALLIANCE OF THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

The Site Owners and Managers Alliance, a membership division of the Personal Communications Industry Association, will address only the second of the two questions certified for consideration by the Court:

> Whether the provisions of the Pole Attachments Act apply to the attachment of wireless equipment as well as to the attachment of wireline equipment.

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BRIEF OF THE SITE OWNERS AND MANAGERS ALLIANCE OF THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

PRELIMINARY STATEMENT [1]

Pursuant to Sup. Ct. R. 37, the Site Owners and Managers Alliance ("SOMA"), a membership division of the Personal Communications Industry Association ("PCIA"), respect-

[1] Pursuant to Sup. Ct. R. 37.6, SOMA certifies that this brief was authored entirely by counsel for SOMA and that no person or entity not identified as a party to this brief made a monetary contribution to the preparation or submission of the brief.

fully submits this brief, as *amicus curiae*, in support of Respondents. In accordance with Sup. Ct. R. 37.3(a), this brief is accompanied by the written consent of all parties.

INTEREST OF SOMA

SOMA is comprised of companies that build, acquire, manage and develop communications towers, antenna structures and other edifices where wireless equipment can be sited. Within its members are four of the five largest national builders and managers of commercial communications towers. PCIA is a prominent national trade association for the personal communications industry. Its mission is to promote the development and continued vitality of personal wireless products, manufacturers and providers. PCIA's general membership includes common carrier and private paging companies; businesses licensed by the Federal Communications Commission ("FCC") to offer two-way mobile wireless service, paging and messaging systems, mobile data products, and network services; FCC licensees of private, wireless systems, including transportation, insurance, utilities and business radio systems; and developers of "third generation" wireless technology and content.

SOMA believes that the FCC's ruling, that 1996 amendments to the Pole Attachments Act ("PAA"), authorized the FCC to include wireless communications attachments within the scope of its regulatory authority, is erroneous. The FCC's analysis mistakenly presumes that utility poles comprise a significant portion of wireless siting facilities and that these utility poles are a "bottleneck" constraining the siting of wireless equipment. The FCC's assumption is factually unsupported. There is a highly competitive market devoted to siting wireless equipment and SOMA's members are principal competitors in this market. By upholding the FCC's analysis of the PAA, the Court would sanction unnecessary and intrusive government regulation in an area where the federal government does not

have a substantial interest. Such regulation goes impermissibly beyond the PAA's purpose, to foster a competitive environment, to ensure that limited facilities are available at reasonable rates, and to eliminate monopolistic control over elements essential to construction of a wired network. There is no bottleneck for wireless communications equipment sites as there is for wireline attachments by cable systems and telecommunications carriers that must have access to utility poles in order to provide services to the public. In fact, wires used by wireless communications providers to connect to the public switched telephone network benefit from PAA provisions granting wires open access to the utility poles at regulated rates.

As the association which represents a majority of the publicly-traded companies in the private tower ownership industry, SOMA has extensive knowledge that directly pertains to the question presented in this case and that has not already been submitted to the Court. SOMA may, therefore, be uniquely helpful to the Court in exposing the flaws in the FCC's construction of the PAA and explaining the harmful consequences of that holding.

SUMMARY OF ARGUMENT

When a federal agency construes a statute and the statutory language and intent of Congress are clear, the agency has no discretion to change the meaning, but instead "must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) ("*Chevron*"). The Eleventh Circuit, in *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000), *cert. granted in part*, __ U.S.__, 121 S. Ct. 879 (2001), held that in construing the Pole Attachments Act ("PAA"), the FCC failed to observe the clear intent of Congress, as required under *Chevron*, and impermissibly read the PAA to encompass wireless equipment attachments, as well as wired attachments of telecommunications providers and cable

systems. *Id.* at 1273 and n. 21. Soma respectfully asserts that this Court should affirm the Eleventh Circuit's judgment.

Congress enacted the PAA in 1978. *See* Communications Act Amendments of 1978, Pub. L. No. 95-234, 92 Stat. 33. It was a narrowly-drawn statute that delegated to the FCC the authority to ensure reasonable rates for cable systems seeking to attach their cables to poles owned or controlled by "utilities." The PAA granted the FCC the right to regulate "any attachment" by a cable system. Pub. L. No. 95-234, sec. 6, § 224(a)(4), 92 Stat. 33, 35 (1978) (codified, as amended, at 47 U.S.C. § 224(a)(4)). It was apparent, however, using common sense and traditional principles of statutory construction, that in 1978 Congress intended the FCC only to regulate wire attachments.

From 1978 until Congress amended the PAA as part of the landmark, deregulatory Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.) ("1996 Act"), there was apparently no dispute as to the carefully circumscribed character of the PAA. The 1996 Act amendments to the PAA extended its protections to "any attachment" by cable systems and telecommunications carriers. Pub. L. No. 104-104, § 703(3), 110 Stat. 56, 150 (1996) (codified at 47 U.S.C. § 224(a)(4)). There is no indication that by expanding the universe of entities whose wire attachments were to be regulated, Congress also intended, without otherwise modifying the statutory language, to fundamentally alter the scope of the PAA to regulate wireless attachments.

The FCC nevertheless interpreted the PAA to govern wireless equipment attachments. *Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 F.C.C.R. 6777, 6798-99 (1998) ("*PAA Order*"). Even if the 1996 Act amendments to the PAA could be deemed ambiguous with respect to wireless equipment

attachments, the FCC's interpretation is patently unreasonable and is not entitled to deference under *Chevron*. *See* 467 U.S. at 845. The PAA was enacted to eliminate "bottleneck" access to utility poles, rights-of-ways, and conduits that were critical to development of wireline communications systems. These essential facilities were, and are, controlled by "utilities." By contrast, the market for siting wireless equipment has long thrived and, in the absence of intrusive and unnecessary government regulation, is fiercely competitive. It is certainly not dominated by the "utilities" that are regulated by the PAA.

Rather, the chief competitors in this wireless facilities siting market are the members of SOMA and entities such as the Wireless Industry *Amici*.[2] These companies own or manage many of the towers, building walls and rooftops, church steeples, chimneys, smokestacks, water towers and other locations where wireless equipment can be attached. Mandating access to the facilities of "utilities" by wireless equipment users is not necessary and would thwart Congress's goal of deregulating the communications industry and encouraging a competitive marketplace, as expressed in the 1996 Act.

Common sense also confirms that the FCC erred by applying the PAA to wireless equipment attachments. The basic pole attachment rate formula imposed by Congress includes elements and concepts such as "usable space" that are not readily applicable to wireless equipment or siting facilities. See 47 U.S.C. § 224(d)-(e) (1994 & Supp. IV 1998). The differences between wireless and wireline equipment attachments are so stark that the two cannot

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[2] *See* Brief of Association For Local Telecommunications Services, AT & T Wireless Services, Inc., Teligent, Inc., Winstar Communications, Inc., Wireless Communications Association International and XO Communications as *amici curiae* in support of Petitioners.

readily be compared at all.[3] Yet, the FCC's interpretation of the PAA would awkwardly force the wireline market rate concepts onto the wireless market. The Eleventh Circuit correctly overturned the FCC's unjustified intrusion into the relationship between the utilities and wireless equipment users, and correctly decided that the FCC has no authority to regulate wireless attachments. The Eleventh Circuit's judgment should be affirmed.

ARGUMENT

I. THE POLE ATTACHMENTS ACT DOES NOT GOVERN ATTACHMENTS OF WIRELESS EQUIPMENT TO UTILITY POLES.

This brief addresses a single issue before this Court: whether the provisions of the Pole Attachments Act ("PAA") govern attachments of wireless equipment to a "pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4) (1994). The FCC held that Congress intended to impose rate regulation on wireless equipment attachments when it amended the PAA to expand the universe of entities entitled to regulatory protection, from cable systems to all providers of telecommunications services. *PAA Order*, 13 F.C.C.R. at 6799.

This conclusion, offered by the FCC without analysis or support in its administrative record, contradicts the plain language of the PAA, is not supported by the legislative history and is inconsistent with Congress's goal of

[3] A wireline attachment generally consists of cables or wires and associated equipment affixed to a pole. *Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925, 928 (D.C. Cir. 1993). The *PAA Order* aptly characterized wireless attachments as "includ[ing] an antenna or antenna clusters, a communications cabinet at the base of the pole, coaxial cables connecting antennas to the cabinet, concrete pads to support the cabinet, ground wires and trenching, and wires for telephone and electric service." 13 F.C.C.R. at 6799.

encouraging natural market forces and competition in the communications industry. The Court should affirm the Eleventh Circuit's holding that the FCC erroneously interpreted the PAA to enlarge its regulatory reach.

A. Congress Only Intended The Term "Any Attachment" In The PAA To Encompass "Wire" Attachments.

Prior to the 1978 enactment of the PAA, the nationwide build-out of cable television systems was still in its infancy. Then, as now, cable systems depended on the ability to run many miles of cable to and from headends to subscribers' homes and businesses. Faced with prohibitive expense as well as an inability to obtain necessary local governmental consents to create an independent system of poles, ducts and conduits to support these wires, cable television systems leased space on poles from utility and telephone companies. *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987). Because there were no reasonable siting alternatives, cable systems lacked bargaining power and alleged that they were forced to accept unreasonable terms offered by pole owners. *Id.*

Cable systems and Petitioner NCTA sought relief from the FCC. The FCC, however, concluded that it lacked the authority to regulate the pole attachment contracts between utility companies and cable systems because utility pole attachments were outside of the FCC's jurisdiction to regulate "all interstate . . . communications by wire or radio." *California Water And Tel. Co.*, 64 F.C.C. 2d 753, 758 (1977), *quoting United States v. Southwestern Cable Co.*, 392 U.S. 157, 173 (1968).

At least in part in response to the *California Water and Tel. Co.* decision, Congress enacted the PAA. The PAA was exceedingly narrow in scope and designed to remedy a single problem: allegedly unfair contracting practices by monopoly

providers of wireline siting facilities. To address this discrete governmental interest, Congress narrowly expanded the FCC's jurisdiction to ensure that in the absence of successful negotiations, a cable system could obtain, through the FCC's processes, reasonable rates and terms for its attachments to a limited group of utility poles owned by a carefully circumscribed set of utilities. 47 U.S.C. § 224(b)(1994).[4]

The PAA entitled cable systems to regulated rates for "any attachment" on poles covered by the PAA. In construing this critical statutory term, the meaning of the phrase "any attachment" cannot be determined in isolation, a true understanding of its meaning must be drawn from its contextual usage. *Deal v. United States*, 508 U.S. 129, 132 (1993). Despite the breadth of the phrase "any attachment," it is apparent that Congress, the cable industry, the FCC and utility companies universally understood that "any attachment" by a cable system meant any "wire" attachment. Congress is presumed to be aware of "existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988). Pursuant to this venerable principle, this Court may presume that Congress was cognizant of the industry's construction of the term "attachment" in 1978, and that it did not intend to apply the term "any attachment" to wireless equipment when it enacted or amended the PAA.

Other language in the original PAA buttresses this perception. In Section 224(d)(2), Congress obligated the FCC to calculate just and reasonable rates for pole

[4] Poles owned by federal or state governments, private companies, railroads, cooperative utilities and poles not used "in whole or in part, for wire communications," were specifically excluded from the scope of the PAA. The owners of these poles either had not attempted to obtain unjust or unreasonable rates and terms, or they did not own a substantial number of poles to which attachments were made. S. Rep. No. 95-580, at 18-19, *reprinted in* 1978 U.S.C.C.A.N. 109, 126-27.

attachments with specific reference to "usable space" on a pole, which is defined as "the space above the minimum grade level which can be used for the attachment of wires, cables and associated equipment." 47 U.S.C. § 224(d)(2) (1994). This concept, as recognized later by the FCC, *PAA Order*, 13 F.C.C.R. at 6799, is difficult, if not impossible to apply to the attachment of wireless equipment, which is fundamentally distinct and consumes much more pole space than wireline attachments. *See, infra*, at 20-22.

The legislative history of the PAA also is consistent with a restrictive scope of the phrase "any attachment." Prior to enactment of the PAA, the FCC asked Congress to modify the draft statute to eliminate language which would have permitted it to regulate "any attachment for wire communication." The FCC was concerned that this language was *too broad*, and that "under the proposed bill, the [FCC] might be involved in assuring just and reasonable rates for the *use of poles by not only cable television system operators but also by many other users of wire communications*." H.R. Rep. No. 1630, 94th Cong., 2d Sess. 2 (1976) (emphasis added). The FCC further opined that "if the legislative intent of the bill is merely to remedy pole attachment problems which are of importance to the cable television industry, then its application should be so limited, preferably by inserting the term 'cable television system' as defined by 47 C.F.R. § 76.5(a) in lieu of 'wire communication.'" H.R. Rep. No. 1630 at 30-31.

Congress incorporated this more "limited" language into the final version of the PAA, which strongly suggests not only that Congress and the FCC understood that the PAA applied only to wireline attachments, but that the PAA would apply only to a particular class of wireline attachments—those essential to the fledgling cable industry.[5] It is also

[5] The Senate Report to the PAA explains that a pole attachment is "the occupation of space on a utility pole by the distribution facilities of a

difficult to conclude that the FCC perceived its own jurisdiction under the 1978 version of the PAA to encompass wireless equipment attachments, as there is no discussion of wireless equipment in the FCC rulemakings implementing the statute.

Using well-settled principles of statutory construction, SOMA has been unable to divine from the structure of the PAA, its language or legislative history, that in 1978 Congress intended the term "any attachment" to include wireless equipment attachments. The FCC's current reading of the PAA could be sustained only if there is clear Congressional intent from the 1996 Act amendments to expand the PAA to cover wireless equipment attachments. No such Congressional intent exists.

B. Congress Did Not Extend The PAA To Wireless Equipment When It Amended The PAA To Apply To Attachments By Telecommunications Carriers.

As part of the 1996 Act, Congress revised certain provisions of the PAA. These revisions did not create an ambiguity in the meaning of the term "any attachment." Consequently, there was no foundation under *Chevron* for the FCC to undertake its own unrestrained interpretation of the PAA at the expense of Congress's expressed will. 467 U.S. at 842-43.

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cable television system—coaxial cable and associated equipment—. . ." S. Rep. No. 95-580, at 2, *reprinted in* 1978 U.S.C.C.A.N. 109, 110. In the Section By Section Analysis, Congress recognizes that a "pole attachment" is the "attachment of the cables of a CATV system to a pole . . ." *Id.*, at 26, *reprinted in* 1978 U.S.C.C.A.N. at 134. *See also Id.*, at 27, *reprinted in* 1978 U.S.C.C.A.N. at 135 (describing different rate structures which would reimburse a utility for costs "it would not have incurred but for the presence of CATV cables on its poles.").

The 1996 Act amendments modified the definition of a "pole attachment" from "any attachment by a cable television system" to "any attachment by a cable television system or provider of telecommunications service." 47 U.S.C. § 224(a)(4) (1994 & Supp. IV 1998). The term "telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46) (Supp. IV 1998).

The obvious result of this textual modification was to expand the universe of entities entitled to the benefit of regulated rates for wire attachments to include providers of telecommunications service as well as cable systems. In the 1996 Act, telecommunications providers were included in the historical protections that the cable industry had enjoyed under the PAA. If, however, the FCC's reading of the 1996 Act amendments is correct, then this simple textual change also would authorize a wholesale expansion of the universe of the *types of attachments* that are governed by the PAA, an expansion that would impose government regulation in the place of a competitive wireless equipment siting industry.

The addition by Congress of the words "or provider of telecommunications service" cannot sustain the weight of interpretation that the FCC would have it bear. In analyzing a statute and determining whether Congress "has directly spoken to the precise question at issue," *Chevron*, 467 U.S. at 842, a reviewing court does not confine itself to examining a particular statutory provision in isolation. Instead, the court views the provision in context and interprets the statute to create a coherent regulatory scheme. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1985). Importantly, a reviewing court is guided by common sense in determining Congress's will. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("*Brown & Williamson*").

There is plainly no evidence that Congress intended to alter the well-defined scope of the term "any attachment" in 1996, let alone to achieve an alteration by modifying an ancillary part of the definition of "pole attachment." *See City of Abilene v. FCC*, 164 F.3d 49, 52-53 (D.C. Cir. 1999). The definition of "telecommunications service," upon which the FCC's entire argument is premised, is a general definition, applicable throughout the Communications Act. It is not likely that Congress would have effected a sea change in the scope of the PAA merely by including in one of its definitions a term that applies generally throughout the Communications Act.[6] When Congress wanted a general provision of the Communications Act to have a different meaning in the PAA, as it did with "telecommunications carrier," it specifically set forth the alternate definition. *Compare* 47 U.S.C. § 153(44) (Supp. IV 1998), *with* 47 U.S.C. § 224 (a)(6) (Supp. IV 1998).

The change ascribed by the FCC to the new language also is not minor, nor does it involve mere "interstitial" gap-filling by the FCC. *See Brown & Williamson*, 529 U.S. at 159, *citing* Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986). The change strikes at the very heart of the justification for the PAA and would stretch the PAA far beyond its original purpose of regulating only a narrow class of wire attachments. As this Court stressed in *MCI Telecomms. Corp. v. FCC*, 512 U.S. 218, 229 (1994) ("*MCI*"), in the similar context of telephone rate regulation, it is improbable that Congress would leave to the FCC's *Chevron* discretion the determination of whether a portion of an entire industry would be regulated. *MCI*, 512 U.S. at 231. It is even less likely that Congress would have

[6] The definition of "telecommunications service" is codified in Section 153 of the Communications Act, the general definition provision, and not in Section 224(a), where the remaining terms which apply specifically to pole attachments are defined.

achieved this substantial result through such a "subtle" revision as adding the term "telecommunications service," rather than through explicit language or without a clear indication in the legislative history. *American Hosp. Assoc. v. NLRB*, 499 U.S. 606, 613-614 (1991).

The dominant purpose of the 1996 Act was to promote competition by lowering entry barriers for entrepreneurs and to encourage existing telephone, utility and cable companies to compete in each other's core businesses. H.R. Rep. No. 104-204, at 47-55 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 11-18. In this context, the amendment to Section 224(a)(4) of the PAA merely ensures that the wireline attachments of competitors to existing cable or telecommunications franchises (such as Open Video Systems) will be entitled to the same wire attachment rates and accessibility as are currently enjoyed by cable companies providing traditional cable video service or non-traditional telecommunications services. *See Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993).

When Congress amended the PAA, it did not enlarge the original, circumscribed, meaning of the term "any attachment" to encompass wireless equipment attachments.[7] In the absence of such a modification, there was no basis for the FCC to divine a Congressional intent to transform the fundamental nature of the PAA—a statute governing wired attachments. The Eleventh Circuit appropriately rejected the FCC's interpretation of the 1996 amendments to the PAA and that conclusion should not be disturbed.

[7] A restrained construction of "any attachment" is sensible because the PAA is not an expansively drawn act meant to encompass all types of conduct—it applies to a narrow class of attachments and to a circumscribed class of poles and ducts. *See Salinas v. United States*, 522 U.S. 52, 56-57 (1997).

II. THERE IS A COMPETITIVE WIRELESS EQUIPMENT SITING INDUSTRY; UTILITIES ARE NOT A "BOTTLENECK."

If there were an ambiguity in the scope of the definition of "any attachment" in the PAA, thereby entitling the FCC to undertake its own interpretation, a court is not obligated to defer to that interpretation if it is not reasonable. *See MCI*, 512 U.S. at 229. The FCC's construction of the phrase "any attachment" to encompass wireless equipment siting is not reasonable. It proceeds from a erroneous factual basis and defies common sense. The Eleventh Circuit rightly refused to defer to the FCC's construction of the statute.

A. A Competitive Market For Wireless Equipment Attachments Thrives Without Government Regulation Or Intervention.

The PAA was enacted to address a discrete problem, the use of monopoly market power by utility companies in negotiating contracts by which cable systems gained access to utility poles for their wires, cables and associated equipment. These poles are vital to the build-out of a wired cable system and, today, as in 1978, there is no functional equivalent. Because cable systems must attach wires to "utility" poles, government intervention into this impaired competitive market was both reasonable and necessary. As a practical matter, like cable system wires, telecommunications wires must be strung on an extensive network of poles in order deploy an adequate network.

There is no corresponding "bottleneck" for the siting of wireless antennas and associated equipment. Wireless communications equipment uses the spectrum to radiate signals through the air. Accordingly, users of this equipment enjoy ample siting alternatives. Wireless equipment may be sited on free-standing dedicated communications towers (including monopole towers and self-supporting towers),

building walls and rooftops, church steeples, chimneys, smokestacks, water towers, billboards, highway light structures, and, of course, utility poles.[8]

Precisely because wireless equipment can be sited in myriad locations, there is a thriving market for the provision of this space. In response to the increasing demand for sites for wireless equipment, an entire industry has developed to create, maintain, and service the siting of wireless equipment for telecommunications providers.

1. The Private Tower Industry Has Developed and Matured Through The Past Decade.

In the past decade, the ownership of communications towers—the principal location for wireless equipment attachments—has undergone a radical transformation. Until recently, virtually all towers dedicated to wireless communications or broadcast radio and television transmissions were owned by FCC licensees that concurrently utilized space on those towers. Those towers generally were built by tower construction companies for wireless equipment users or by the users themselves.

Since the early 1990s, this trend has begun to reverse. A variety of circumstances has contributed to this change. For example, under increasing pressure from their stockholders to maximize profits and trim costs, certain wireless service providers have resolved to focus on their core business of operating communications systems and have turned away

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[8] According to Fryer's TowerSource Market Report 2001, a reputable industry publication, there are an estimated 201,000 usable communications towers in the United States. Fryer's estimates that there are another 55,000 viable rooftop sites available for siting wireless equipment, as well as numerous other usable sites located on other edifices. *See* www.towersource.net/market_analysis.html.

from the ownership and construction of towers, becoming tenants instead.

Concurrently, tower construction companies and other non-FCC licensees recognized that the rapidly burgeoning wireless communications industry would need numerous antenna sites in order to build out their networks and that operating these sites could be a profitable enterprise. These companies began to take the place of the carriers as major providers of wireless communications sites. SOMA's membership is comprised of these types of companies, whose core business is constructing, owning and managing dedicated communications towers and other locations where wireless equipment can be sited.

Today, SOMA's members own or manage thousands of sites nationwide and contribute essential facilities to the wireless communications infrastructure.[9] But SOMA's members are by no means the only competitors. Federal, state and local governments, numerous "mom and pop" tower companies, the Respondent utility companies, building and billboards owners, other independent owners of locations to which equipment can be attached and, significantly, the Wireless Industry *Amici*, *see* n. 2, *supra*, all compete for a share of the multi-faceted wireless equipment siting market. Tenants at wireless attachment sites include mostly cellular telephone, PCS, or paging companies, although other categories of tenants, including radio and television broadcasters, advanced wireless internet providers, businesses that transmit signals via spectrum between fixed antenna locations, and local government public safety users commonly rent space.

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[9] Fryer's estimates that tower companies of all sizes own approximately 40% of the estimated 201,000 communication towers nationwide, while communications carriers own roughly 18%, governmental units own about 10%, and utilities are estimated to own 3.4% (7,000) of those towers. *See* www.towersource.net/market_analysis.html.

The largest private tower companies are publicly held, with their stock traded on national exchanges. They tend to be heavily leveraged, at least in part so that available funds can be used to facilitate rapid growth. Unlike some other competitors for wireless attachments, SOMA's members' core business is generating revenue from leasing and managing communications sites. They also generate substantial revenues from network development—transactions in which a tower company partners with a wireless provider to develop an entire wireless network infrastructure in a particular locality. The tower company typically is intimately involved at each stage of the complex network design and planning.

The past five years have been particularly significant for SOMA's members and the wireless communications siting field, in general. During this period the FCC has authorized myriad new wireless services and granted additional licenses for traditional wireless providers. These licenses typically have strictly enforced and relatively abbreviated construction timetables. *See, e.g.*, 47 C.F.R. § 73.3598 (2000) (mandating three-year construction period for broadcast radio and television stations; extensions granted only in two narrow circumstances); 47 C.F.R. § 90.665 (2000) (establishing five-year construction deadline for 900 MHZ specialized mobile radio licensees). The wireless equipment siting industry has adapted and grown to offer service to these potential tenants.

Within SOMA's membership, there has been enormous growth and consolidation. The two principal growth strategies for SOMA's members are new construction and the acquisition of existing towers. Each of these strategies has been, and continues to be, heavily dependent on the participation of and, thus, the economic success of, wireless communications providers, including the Wireless Industry *Amici*.

Each year, SOMA's members construct thousands of new communications towers. These towers will generally accommodate six to eight users and follow one of two scenarios, referred to in the industry as "build to fill" and "build to suit."

A "build to fill" tower is erected before an "anchor" tenant or other users have contracted for space on the tower. These towers are sited in strategically desirable locations, usually along major and secondary roadways or in growing communities with high population density and significant commuting. Tower companies use sophisticated mapping and analysis techniques to choose "build to fill" sites.

Under a "build to suit" program, a tower company erects a structure at the behest of an "anchor" tenant, usually a wireless service provider, at a site determined by the tower company within a narrow radius (search ring) of a set of specific geographic coordinates designated by the provider. The tower company retains ownership of the facility and the exclusive right and discretion to add other tenants to the tower. A key component of most "build to suit" deals is that the wireless provider will negotiate a long-term lease for space on each tower at a reasonable rental rate as determined by the marketplace and the tenant. Tower companies may also negotiate for the right to build all of the towers needed for a particular wireless telecommunications provider's systems on a going forward basis. This continuing relationship is an important aspect of the businesses of SOMA's members.

The other common avenue for tower company growth is the acquisition of existing towers, by which a tower portfolio can be amassed rapidly. While most acquisitions involve only a few towers (because there are few entities that own extensive clusters of towers) the key acquisitions for SOMA's members are those from wireless communications providers, in which hundreds or thousands of towers are purchased at

one time. In fact, transactions with carriers, including the Wireless Industry *Amici*, have been the principal source of growth of the tower industry.[10]

In these arms-length transactions, wireless providers frequently negotiate beneficial terms, including long-term leases at reasonable rates and favorable location of their equipment at optimal heights on the towers. Consideration for these transactions may include stock or other interests in the tower company, which encourages the provider to continue to work with a particular tower owner.

In addition to their acquisition programs, SOMA's members enter into management and lease/sublease agreements with wireless providers. In these transactions, the wireless provider retains ownership of the towers and utilizes space on them, but the tower company contracts to oversee maintenance, upkeep and most other business and regulatory responsibilities, in exchange for the right to market and lease remaining space on the tower and retain all or most of the related rental income.[11] A similar scenario exists for the siting of equipment on non-tower structures such as building rooftops and municipal water towers.

The wireless equipment siting industry, exemplified by the members of SOMA, continues to mature and develop. It is a fiercely competitive industry and SOMA's members have invested heavily and devised complex business plans to survive competition not only from each other, but from numerous other tower owners.

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[10] Not only are wireless communications providers the primary tenants of SOMA's members, they are also significant competitors. Despite their recent sales of towers to SOMA members and other tower companies, wireless providers still own or control thousands of towers, *see* n. 9, *supra*, and are usually larger and better capitalized than tower companies.

[11] SOMA's members also manage towers, rooftops and other sites for building owners, utilities, and other land owners. These agreements usually parallel management agreements for traditional towers.

It is difficult to reasonably conclude, in light of these facts, that Congress could have intended, without so much as a word in the 1996 Act amendments to the PAA or the legislative history, to intrude on this competitive market in the manner suggested by the FCC's interpretation of the PAA. *MCI*, 512 U.S. at 231. Upholding the FCC's construction would create a particularly anomalous result, given that "utilities" (as defined in the PAA) are not major competitors in the market for siting wireless equipment. *See, e.g.*, n. 9, *supra*. Indeed, if wireless communications providers had believed that utility poles presented a bottleneck to the construction of their service areas, or that tower owners could present such a bottleneck, they never would have consigned their infrastructure inventory to third parties. Once again, the facts and common sense combine to highlight the FCC's gross misinterpretation of the PAA.

2. The Wireless Equipment Siting Industry Is Fundamentally Different From The Wireline Siting Industry.

The FCC's construction of the PAA suffers from another important flaw. The FCC assumes that concepts applicable to wire attachments easily translate to the wireless arena. But the two types of attachments are separate and distinct. For example, in amending the PAA, Congress specifically applied the concept of "usable space" to attachments by a "provider of telecommunications service" through the rate formula established in Section 224(e). 47 U.S.C. § 224(e)(2) (Supp. IV 1998). This concept is challenging to apply in the context of wireless equipment attachments because of significant differences between the size of wired and wireless attachments. *See PAA Order*, 13 F.C.C.R. at 6799 (acknowledging that applying rate rules to wireless attachments may engender "potential difficulties" because of "unusual requirements" of wireless equipment).

Traditional wire attachments (both cable and telecommunications) may consist of "coaxial or fiber optic cable and associated equipment. . . . The cables are lashed to an aerial support strand, which in turn is affixed to a single point within the section of the pole designated as 'communications space.'" *Texas Utils. Elec. Co. v. FCC*, 997 F2d 925, 928 (D.C. Cir. 1993). These cables are presumed to occupy one foot of "usable space" on a pole, although the actual wire only occupies approximately one inch, with the remaining space serving as protective clearance from electrical or other wires. *Amendment of Rules and Policies Governing Pole Attachments*, 15 F.C.C.R. 6453, 6466 (2000) ("*Attachment Order*").

By contrast, it is the experience of SOMA's members that the average wireless attachment consists of either a long "whip" antenna attached directly to a tower, or a panel, dish or horn-shaped antenna attached by grappling clamps to an arm mount or platform on a tower.[12] Each antenna has two separate associated cables. Coaxial cable attaches to the transmitter or other powering source, which is usually housed in a large cabinet or small building on site. A separate power cord from the antenna connects to the public electric system. Panel antennas are commonly at least four feet high (with an additional ten feet needed for separation due to signal interference concerns), while a "whip" antenna may be from six to twelve feet in length. Microwave dishes and horn

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[12] Many wireless communications systems need "line of sight" coverage for their services to function effectively. *See, e.g.*, 47 C.F.R. § 21.117 (2000) (domestic fixed public radio); 47 C.F.R. § 73.315 (2000) (FM broadcast stations). The height of the placement of the antenna is a critical factor in achieving this coverage. Accordingly, the uppermost sections of a communications tower, which are usually above the tops of utility poles, are more valuable and preferred by SOMA's tenants.

antennas may be up to fifteen feet in diameter.[13] This elemental difference between types of attachments, which distorts the "usable space" concept, is further evidence that the FCC strayed from Congress's intent in construing the 1996 Act amendments to the PAA.

B. No Government Regulation Of Wireless Equipment Attachment Agreements Is Necessary Or Justified.

The market for siting wireless communications attachments historically has not been subject to government regulation as it pertains to the source of siting opportunities. Nothing in the PAA, its legislative history, the FCC's public comment process leading to the *PAA Order*, or the current functioning of the market indicates that a different regulatory treatment is suddenly warranted.

First, from a competitive perspective, there is no single entity or type of entity (such as utilities) that is, or could be, a "bottleneck" for the siting of wireless communications equipment. There are simply too many available locations in which to site this equipment for a single company or type of provider to exert the monopoly power that utilities were alleged to have in the wired arena.

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[13] The inherent differences in the sizes of wireless and wired attachments account, in part, for the vast discrepancy in the size of utility poles and communications towers. Utility poles are typically of uniform height. The FCC, in applying the PAA's rate regulation scheme, presumes that a utility pole is 37.5 feet in height and contains 13.5 feet of "usable space" for attachments. *Attachment Order*, 15 F.C.C.R. at 6465-66. Towers used for wireless attachments vary considerably in height, with the tallest exceeding 2000 feet above ground and the average tower reaching 200-250 feet above ground. Virtually all of the space on a traditional tower is usable for attachments, subject to spacing between equipment necessitated by radio frequency radiation interference concerns.

Second, wireless telecommunications providers do not face unfair bargaining, nor are they forced to accept contracts of adhesion from utility companies regulated by the PAA in order to obtain access to usable sites for their wireless facilities. Indeed, because wireless providers are a primary and vital source of income for owners of communications towers and other equivalent structures, they are able to negotiate favorable lease terms and reasonable rates, as defined by the marketplace and not through government regulation.[14]

Third, wireless equipment attachments historically have been subject to far more limited and lenient regulatory treatment by the federal government. The FCC may review a proposed communications site for compliance with certain federal statutes such as the National Environmental Policy Act and the National Historic Preservation Act, *see* 47 C.F.R. § 1.1301, *et. seq.*, and the FCC's various regulations concerning radio frequency radiation and air safety, *see* 47 C.F.R. § 17.1, *et seq.*, However, the FCC traditionally has not otherwise regulated the relationship between owners of wireless equipment and owners of sites upon which to attach that equipment.

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[14] There is a stark difference between the fair market value for wireless and wire attachments. In the past year, the FCC's Cable Services Bureau has approved "just and reasonable" annual lease fees for one foot of usable space of $7.47 per pole, *Alabama Cable Telecomms. Assoc. v. Alabama Power Co.*, 15 F.C.C.R.17346 (Cable Servs. Bur. 2000), and $5.12 per pole, *Cavalier Tel., LLC v. Virginia Elec. and Power Co.*, 15 F.C.C.R. 17962 (Cable Servs. Bur. 2000). By contrast, in the experience of SOMA's members, the average monthly lease rate for a wireless equipment attachment on a traditional communications tower is approximately $1,500, with additional charges for utilities consumed by the tenant. The lease rates for traditional towers are significantly higher than the rates for wire attachments because of factors such as the cost of constructing towers, their geographic location, the number of actual and potential users of the towers, the desirability of the location of the tenant's equipment on the towers, and the identity of the attaching party.

Fourth, to SOMA's knowledge, no wireless telecommunications provider has ever complained to the FCC or sought regulatory relief due to a lack of usable sites or an inability to secure either fair market leasing rates or sufficient space on wireless siting facilities or utility poles. Indeed, it is unlikely that wireless carriers would have disposed of, and continue to sell off their tower portfolios if they believed it would result in their being subjected to unreasonable leasing rates or terms. In any event, the wireless equipment market continues to thrive and expand as the use of wireless communications devices and needs of wireless providers increases.

Neither the text nor legislative history of the PAA addresses, much less contradicts, this understanding of the market for wireless equipment siting. The *PAA Order* implementing the FCC's interpretation of the 1996 Act amendments to the PAA does not cite any evidence or public comment establishing that utilities are "bottlenecks" for wireless equipment siting or that the utilities have engaged in unfair bargaining for such attachments. The FCC's decision on this point contains little analysis at all. *See American Hosp. Assoc. v. NLRB*, 499 U.S. at 618 (noting the extensive rulemaking conducted and careful analysis of comments and well-reasoned justification of new rule undertaken by NLRB as partial grounds for upholding rule).

In light of the foregoing examination of the state of the wireless equipment siting market, the FCC's decision to extend the PAA to wireless equipment attachments stands as a remarkable refutation of market principles in favor of intrusive and far-ranging government regulation. By construing the term "any attachment" to include wireless equipment, the FCC unreasonably abandoned common sense and the historical regulatory restraint afforded this market. Consequently, no deference to this interpretation is necessary. *Chevron*, 467 U.S. at 842. *Cf. Bates v. Little Rock*, 361 U.S. 516, 525 (1960) (governmental action must bear some

reasonable relationship to achieving the governmental purpose asserted as justification for the regulation).

C. The FCC's Interpretation Of The PAA Is Inconsistent With Congress's Intent To Deregulate The Communications Industry.

The 1996 Act was a landmark statute, touching, or altering, numerious aspects of the underlying Communications Act of 1934. The 1996 Act's unifying principle is to encourage market forces and competition and abridge or abolish governmental intrusion on functioning markets. H.R. Rep. No. 104-204, at 47-55 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 11-18. Congress expressed this preference for competition throughout the 1996 Act.

For example, Congress eliminated the national broadcast ownership caps and substantially relaxed the local ownership rules. Pub. L. No. 104-104, § 202 (1996) (directing FCC to adopt statutorily-imposed changes to ownership rules). In the cable arena, it established a sunset date for federal regulation of certain cable rates, clarified the right of incumbent providers to petition for a determination of effective competition to eliminate all rate regulation, Pub. L. No. 104-104, § 301 (1996) (codified at 47 U.S.C. § 543), and promoted the development of DBS and other satellite-delivered programming as competition to cable by prohibiting restrictions on the siting of over-the-air reception devices. Pub. L. No. 104-104, § 704 (1996) (codified at 47 U.S.C. § 332(c)(7)).

Most notably, Congress enacted a complex series of provisions to encourage competition in the local and long distance telephone markets by both new entrants and other companies (including cable systems and utilities). Section 257(b) of the Communications Act, adopted as part of the 1996 Act sets forth the "National Policy" on communications competition that "the [FCC] shall seek to promote the policies

and purposes of the [Communications] Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity." 47 U.S.C. § 257(b) (Supp. IV. 1998). The House Conference Report explains that the 1996 Act was designed to "provide for a procompetitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition, and for other purposes." H.R. Conf. Rep. No. 104-458, at 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 124.

To effectuate this policy, Congress directed the FCC to identify and eliminate entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications or information services. 47 U.S.C. § 257(a) (Supp. IV 1998). Congress further ordered periodic reviews of the FCC's regulations to continue to eliminate market entry barriers and for the FCC to recommend to Congress statutory provisions that might be eliminated to encourage competition. *Id.*

As yet a further spur to competition, Congress enacted a forebearance policy, ordering the FCC to not apply any regulation or any provision of the Communications Act to "a telecommunications carrier or telecommunications service" if the FCC concludes that enforcement of the provision is not needed to ensure just and reasonable and non-discriminatory rates and practices. 47 U.S.C. § 160(a) (Supp. IV 1998). In making that determination, the FCC is required to consider whether forbearance will "promote competitive market conditions" and "enhance competition among providers of telecommunications services." 47 U.S.C. § 160(b) (Supp. IV 1998).

Congress also enacted restrictions on the ability of state and local governments to thwart the development of new communications sites through a national wireless equipment siting policy, 47 U.S.C. § 332(c)(7) (Supp. IV 1998). Against the backdrop of this unambiguously deregulatory scheme, the FCC adopted an interpretation of the 1996 Act amendments to the PAA which has the direct effect of substantially increasing government intrusion and regulation of a market which, by all available evidence, functions effectively. The FCC's decision is unequivocally inconsistent with the general approach to competition dictated by Congress and the specific textual limitations on the scope of the PAA set forth in that statute.

CONCLUSION

For the foregoing reasons, SOMA respectfully requests that the Court affirm the holding of the Eleventh Circuit, a decision which adheres to Congress's intent as expressed in the 1996 Act amendments to the PAA, is consistent with Congress's desire to deregulate the communications industry, and respects the economic and practical distinctions between the markets for siting wireline equipment and wireless equipment.

Respectfully submitted,

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In the
SUPREME COURT OF THE UNITED STATES

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA

and

NATIONAL CABLE TELEVISION ASSOCIATION, INC.,

Petitioners,

v.

GULF POWER COMPANY, *et al.*

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

Brief of Real Access Alliance as *Amici Curiae* in Support of Respondents

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QUESTION PRESENTED

The Real Access Alliance addresses the second of the two issues before this Court, as stated by Respondents American Electric Power Service Corporation, *et al.*, which is:

Whether 47 U.S.C. § 224 grants the Federal Communications Commission jurisdiction to regulate attachments of wireless telecommunications equipment.

PARTIES TO THE PROCEEDING

The Petitioners before the Court in this proceeding are the United States of America, the Federal Communications Commission, and the National Cable Television Association.

The Respondents before the Court in this proceeding include Alabama Power Company, American Electric Power Service Corporation, Ameritech Corporation, Atlantic City Electric Company, BellSouth Corporation, Cable Television Association of Arizona, Commonwealth Edison Company, Comptel, Delmarva Power & Light Company, Duke Energy Corporation, Florida Power & Light Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Public Service Electric & Gas Company, Qwest, Savannah Electric Power Company, Sprint, Tampa Electric Company, TXU Electric Company, Union Electric Company, United States Telecom Association, United Telecom Council, Virginia Electric & Power Company, and Worldcom, Inc.

Additional parties appeared before the U.S. Court of Appeals for the Eleventh Circuit but are no longer participating in this matter.

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PRELIMINARY STATEMENT

The Real Access Alliance (the "Alliance" or the "Real Estate *Amici*") respectfully submits this brief pursuant to Rule 37 of the Court's Rules, as *amici curiae* in support of the Respondents in this proceeding.[1]

The Real Estate *Amici* submit this brief in support of affirmance because the grounds for reversal -- particularly the factual and policy arguments -- presented by the Federal Petitioners and the Wireless *Amici* in their briefs to this Court depend on an interpretation of Section 224 that was neither briefed before the Court of Appeals, nor relied on by the agency in its decision. The Federal Petitioners and Wireless *Amici* assume that Section 224 applies not only to poles and other outdoor facilities, but to pathways inside buildings. That interpretation, however, was first adopted by the Federal Communications Commission (the "Commission") in a collateral proceeding only after the opinion of the Court of Appeals had issued, and a petition for reconsideration of that Commission decision is pending before the agency. Accordingly, the briefs of the Federal Petitioners and the Wireless *Amici* raise a potential question under *SEC v. Chenery Corp.*, 318 U.S. 80 (1943): this Court will not sustain an agency decision on a ground that was not relied on in

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[1] Pursuant to Rule 37.6, the Real Access Alliance and its counsel certify that no counsel for a party authored this brief in whole or in part, and no person or entity other than the Real Access Alliance and its members made any monetary contributions to the preparation of this brief. Further, pursuant to Rule 37.3(a), this brief is being filed with copies of the written consent of all the parties.

the agency decision itself. The decision of the Court of Appeals should also be affirmed because any decision based on the interpretation urged by the Federal Petitioners and the Wireless *Amici* would implicate the Fifth Amendment property rights of every building owner in the country.

INTEREST OF THE REAL ESTATE *AMICI*

The Alliance is a coalition of eleven trade associations representing approximately one million members engaged in all aspects of the real estate industry. The Alliance was formed to encourage free market competition among telecommunications companies for services to tenants in commercial and residential buildings, and to safeguard the constitutional property rights of America's real estate owners. Cable operators, wireless and wireline telecommunications providers, and public utilities, including electric power companies, all require access to commercial and residential multi-tenant buildings to serve their customers. Accordingly, the scope and application of the Pole Attachments Act, Pub. L. No. 95-234, § 6, 92 Stat. 35 (1978) (codified as amended at 47 U.S.C. § 224), is a matter of fundamental concern to the real estate industry.

As noted above, there is another proceeding now pending before the Commission that concerns an interpretation of Section 224 that was advanced in the briefs of Federal Petitioners and the Wireless *Amici*. That interpretation raises legal and Constitutional issues that have not been briefed in this case at any

stage. A reversal of the decision of the Court of Appeals could adversely affect property owners by inadvertently endorsing a broader interpretation of Section 224 than Congress intended. The Real Estate *Amici* hope to forestall such an unintentional and potentially unconstitutional effect by providing the Court with a more complete context for its decision.

The real estate industry contributes over eleven percent of the nation's Gross Domestic Product. *Industry Accounts Data, Gross Domestic Product by Industry* United States Department of Commerce, Bureau of Economic Analysis, (1995) (http://www.bea.doc.gov//bea/du2/gposhr.htm). The description of each of the Alliance's members in the Appendix illustrates the magnitude of the interests that might be affected by this case.

COUNTERSTATEMENT OF THE CASE

The Real Estate *Amici* adopt the Counterstatement of the Case set out in the brief of Respondents American Electric Power Service Corporation ("AEPSC"), *et al.* In their brief, AEPSC, *et al.*, mention that in the Commission's *Competitive Networks* proceeding,[2] certain wireless companies have argued that Section 224 grants them access to pathways inside

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[2] *See Promotion of Competitive Networks in Local Telecommunications Markets*, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, 14 FCC Rcd 12673 (1999) (the "*Competitive Networks NPRM*").

buildings for their facilities. AEPSC Brief at pp. 31-32, n.23. The Real Estate *Amici* wish to supplement AEPSC's Counterstatement of the Case by describing more precisely the importance, history and relevance of that proceeding and that issue.

The passage of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Act"), created a new environment for the telecommunications industry. Long dominated by monopoly providers, and hence highly regulated, the industry was to be deregulated in an effort to promote an industry-wide restructuring that would in turn introduce all the benefits of the competitive marketplace to the industry. Given the complexity of the new legislation and the attendant issues, it was not surprising that the Commission should soon embark on dozens of rulemaking proceedings in an effort to implement the will of Congress.

What was surprising, however, was that the real estate industry quickly found itself swept into the Commission's regulatory maelstrom. Within a few months of the passage of the 1996 Act, at least five separate Commission proceedings were underway that threatened the interests of property owners, even though the 1996 Act nowhere directs the Commission to regulate the real estate industry.[3] In fact, Congress

[3] *See Preemption of Local Zoning Regulation of Satellite Earth Stations*, IB Docket No. 95-59, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 5809 (1996); *Implementation of Section 207 of the Telecommunications Act of 1996*, CS Docket No. 96-83, Notice of Proposed Rulemaking, 11 FCC Rcd 6357 (1996) (later combined with Docket No. 95-59); *Implementation of the*

had earlier specifically considered and rejected legislation that would have forced property owners to grant telecommunications providers physical access to their buildings.[4]

In one form or another, all of these proceedings raised the possibility that the Commission would force

Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Notice of Proposed Rulemaking, 11 FCC Rcd 14171 (1996); *Telecommunications Services Inside Wiring, Customer Premises Equipment*, CS Docket No. 95-184, Notice of Proposed Rulemaking, 11 FCC Rcd 2747 (1996); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, MM Docket No. 92-260, Order on Reconsideration and Further Notice of Proposed Rulemaking, 11 FCC Rcd 4561 (1996) (later combined with Docket No. 95-184). The same issues also arose later, in comments submitted in *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Said Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Notice of Inquiry, 13 FCC Rcd 15280 (1998).

[4] S. 1822, 103rd Cong., § 302 (1994). This bill, although never enacted, was one of the predecessors of the 1996 Act and proposed broad reform of the communications industry. As reported out of committee, the bill would have added Section 230(j) to the Communications Act, which would have stated "[n]o person owning, leasing, controlling or managing a multi-unit building shall forbid or unreasonably restrict any occupant, tenant, or lessee of such building from receiving telecommunications services from any provider of its choice. ..." Neither this provision nor anything comparable appear in the 1996 Act.

property owners to permit the installation of communications equipment on their property, over their objections. In each case, various parties sought to obtain the right to install communications equipment of various kinds -- including cable television wiring, telephone wiring, direct broadcast satellite dishes, and other types of antennas -- in or on the property of third parties. Recognizing that it was treading on new and dangerous ground, the Commission either rejected these approaches or delayed a decision by seeking additional comment. *See, e.g., Telecommunications Services Inside Wiring Customer Premises Equipment*, CS Docket No. 95-184, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659 at ¶¶ 59-61, 178 (1997).

Various legal theories and policy justifications were presented to support the requested regulations, but in a 1996 Petition for Reconsideration of the First Report and Order in the Commission's Local Competition proceeding, CC Docket No. 96-98, the wireless industry first advanced the notion that Congress intended Section 224 to apply to "poles," "ducts," "conduits" and "rights-of-way" *inside* privately-owned buildings. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Winstar Communications, Inc. Petition for Clarification or Reconsideration (filed Sept. 30, 1996).

In 1999, previous efforts to establish a forced access regime having failed, this new interpretation of Section 224 was incorporated into a broader effort to convince the Commission to require building owners -- primarily owners of commercial office buildings -- to

grant them the right to install facilities inside buildings on favorable terms.[5]

In the interim, the Commission had initiated and completed the rulemaking that led to this case. The real estate industry did not participate in that proceeding, because it did not appear to implicate the industry's interests.[6] The order reviewed by the Court of Appeals also did not address access to buildings in any way, nor had any prior interpretation of Section 224. *See Implementation of Section 703(e) of the Telecom-*

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[5] A group of competitive carriers headed by several wireless companies met with Commission staff in May 1999 and presented a white paper setting forth various legal theories for forced building access. *See Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, Comments of the Association for Local Telecommunications Service (filed Aug. 27, 1999). The rationale underpinning these demands has been the incorrect allegation that property owners have market power and can therefore impose unreasonable terms on competitive carriers. The competitive carriers have complained that building owners have granted access to the incumbent carriers without requiring them to sign license agreements or pay fees for the right to install facilities in a building. They have also complained that it takes too long for them to gain access to buildings.

[6] *See Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Notice of Proposed Rulemaking, 12 FCC Rcd 11725 (1997) (the "*Pole Attachments NPRM*"). To this extent, the agency's notice of proposed rulemaking did not give notice of the interpretation of Section 224 first briefed in this Court. *See* 5 U.S.C. § 553.

munications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole Attachments. Report and Order, 13 FCC Rcd 6777 (1998) (the "*Pole Attachments Order*").

In any event, ignoring the irony of regulating the real estate industry in the course of deregulating the telecommunications industry, the Commission responded to the wireless industry's request by issuing a Notice of Proposed Rulemaking in June 1999, seeking comments on whether the Commission should grant telecommunications providers access to private property over the objections of the owner. *Competitive Networks NPRM*, 14 FCC Rcd 12673 (1999). The Commission proposed several theories for such regulation, including the theory that Section 224 applies to pathways and facilities inside buildings, even if the owner of the building is not a utility. *Id.* at ¶¶ 39-48. In response, the Alliance submitted thorough and detailed analyses of the Constitutional, legal and factual issues surrounding access to private property by telecommunications providers.[7] In these comments, as in many prior submissions to the Commission, the Alliance conclusively demonstrated that regulation is unnecessary because the market is in fact working. The Alliance also demonstrated that forced access regulations would be impractical, unconstitutional, and beyond the Commission's authority.

[7] *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, Joint Comments of the Real Access Alliance (filed Aug. 27, 1999); Joint Reply Comments of the Real Access Alliance (filed Sep. 27, 1999); Further Comments of the Real Access Alliance (filed Jan. 22, 2001); Further Reply Comments of the Real Access Alliance (filed Feb. 21, 2001).

Among the thousands of pages of materials that the Alliance has provided the Commission are the following:

- A statistically-valid survey conducted by an independent research firm showing that property owners rarely refuse access to competitive providers, primarily because they wish to respond to the needs of their tenants.
- An economic study showing that the real estate industry is a competitive market and that local competition in the office telecommunications market is thriving.
- A survey of building owners, managers, and tenants showing that 80% of office buildings have more than one telecommunications provider, and almost 60% are served by at least three providers.
- A second statistically-valid survey conducted by an independent firm showing that 98% of commercial tenants have never been denied service by the telecommunications provider of their choice as a consequence of the actions of their landlords. In addition, 94% of respondents stated that they had no telecommunications needs that were not being met at their current location.
- Information from various sources, including the Commission and competitive providers, regarding the dramatic rate of growth in the

competitive telecommunications industry since 1996.[8]

In addition, the Alliance presented to the Commission voluntary best practices guidelines for property owners, designed to increase the speed with which requests for access to buildings are processed.[9] These commitments were a key reason that the Commission decided to defer direct regulation of the real estate industry when it issued the First Report and Order in the *Competitive Networks* proceeding in October 2000. 15 FCC Rcd 22983 at ¶ 126 (2000) (the "*Competitive Networks Order*").

Notwithstanding the Commission's decision not to regulate the real estate industry directly, the October 2000 *Competitive Networks Order* formally adopted the position that Section 224 applies to telecommunications pathways inside buildings. 15 FCC Rcd 22983 at ¶ 82. The Commission ruled that if a "utility" for purposes of Section 224 owns or controls poles, ducts, conduits, or rights-of-way inside a building owned by a third party, the utility must grant access to a cable operator or telecommunications provider that requests it. *Id.* at ¶ 85. In an effort to avoid the threat of a taking of private property under the Fifth Amendment, the *Competitive Networks Order* apparently applies only in cases in which the building owner has in some fashion consented to the presence of the attaching party in the building. Nevertheless, the *Competitive Networks Order* is sufficiently ambiguous that the Commission may not have succeeded in that effort, and the Alliance filed a timely Petition for Reconsideration with the Commission on February 12, 2001. The *Competitive Networks Order* also holds open the possibility of imposing future forced access regulations on the real estate industry by further extending the Commission's interpretation of Section 224.[10] The Commission's new interpretation of Section 224 therefore raises a substantial risk that in the name of tele-

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[8] Despite the recent problems the telecommunications industry has faced in the capital markets, the Commission recently released a report stating that local competition nearly doubled in 2000. *Local Telephone Competition: Status as of December 31, 2000,* Industry Analysis Division Common Carrier Bureau, Federal Communications Commission, at 1 (May 2001). (Competitors now serve 8.5% of the local telephone market).

[9] *See Promotion of Competitive Networks*, WT Docket No. 99-217, *ex parte* letter of the Real Access Alliance (filed Sep. 6, 2000). As part of this effort, the Alliance has prepared a model telecommunications license agreement to simplify and speed transactions between office building owners and telecommunications providers. This document has been submitted to the Commission and was released publicly on May 22, 2001. "Office Tenants to Benefit from Landmark Telecom Model License Agreement," http://www.realaccess.org/press052201.htm.

[10] The Massachusetts Department of Telecommunications and Energy ("DTE") recently adopted a forced access rule, relying on its interpretation of the Massachusetts state law parallel to Section 224. 220 CMR §§45.00-45.11 (Aug. 18, 2000). This statute, M.G.L. c. 166, §25A, includes a broad definition of "utility" that the DTE argues includes building owners. The DTE decision is now under appeal. *Greater Boston Real Estate Board, et al. v. Massachusetts Dep't of Telecommunications and Energy,* No. 00-4909-A, filed Nov. 3, 2000 (Mass. Sup. Ct.). The appeal was argued in Suffolk County on May 31, 2001.

communications competition the Commission will regulate an entire new industry without a word of authorization from Congress.

In the *Competitive Networks Order*, the Commission also asked for further information regarding the current state of the market and authorized the Wireless Telecommunications Bureau to request further information on that topic after an eight-month hiatus. The Commission also requested comments regarding several legal issues. These include whether the Commission may regulate the real estate industry indirectly, such as by forbidding telecommunications providers from providing service to subscribers in buildings whose owners do not conform to certain nondiscrimination standards; and whether Section 224 applies not only to defined pathways inside buildings, but to any space in or on a building.

Furthermore, even though the issue of whether Section 224 applies inside buildings has not yet come to rest at the agency level, the Federal Petitioners and the Wireless *Amici* seek to raise the issue here for the first time in this appeal.

In sum, Section 224, which was originally drafted and enacted in an effort to help the cable industry obtain access to wireline facilities, is now being cited in a surreptitious attempt to give wireless telecommunications providers access to privately-owned buildings. Nothing in the express language of the statute, the legislative history, or the history of the order under review justifies such an interpretation.

SUMMARY OF ARGUMENT

The Real Estate *Amici* urge the Court to affirm the decision of the Court of Appeals because its strict reading of Section 224 conforms to the intent of Congress. The Commission has no inherent authority to regulate entities that are not engaged in some facet of the communications business. Consequently, when Congress saw a need for regulating the terms of cable television attachments to poles and other facilities owned by electric utilities, it elected to expand the Commission's authority only in the most limited fashion. Section 224 must be read strictly to prevent the Commission from exceeding this narrow authority. In particular, the Court should avoid any reading of Section 224 that would extend its application to pathways inside buildings. Such an interpretation would present the possibility of a taking of private property, is not properly before this Court, and is still under review by the Commission.

The express purpose of Section 224 was to permit the attachment of wires and associated equipment; the statute contains no reference to wireless equipment, and the 1996 amendments to the statute did not alter any of the pertinent language. Furthermore, the policy underlying Section 224 was to protect operators of wireline facilities from unjust practices related to their use of facilities necessary for the economical construction of new wireline networks. The Court of Appeals was therefore correct in reading the statute to preclude Commission regulation of attachments of wireless equipment.

Finally, the Federal Petitioners and the Wireless *Amici* would have the Court indirectly resolve a matter that was not addressed in the Commission's rulemaking or the decision of the Court of Appeals. They assert that the Court of Appeals concluded that wireless equipment does not qualify for the benefits of Section 224 because it failed to understand that some wireless providers do not use poles, towers and similar structures, but must have access to specific buildings to reach their customers. In fact, however, the *Pole Attachments Order* indicates that the Commission was concerned with mobile wireless providers and did not consider the siting needs of fixed wireless operators. The Court of Appeals was entitled to rely on the examples and issues discussed by the agency in the *Pole Attachments Order*. Furthermore, when the case was decided, Section 224 had never been held to apply to any facilities in or on privately-owned buildings, and the Commission had opened the *Competitive Networks* proceeding to address that very question, which remains unresolved, pending reconsideration. Federal Petitioners cannot now rely on a *post hoc* rationalization of counsel, and the *Pole Attachments Order* cannot be affirmed on a rationale that the Commission did not recite in that *Order*.

ARGUMENT

I. SECTION 224 IS A LIMITED GRANT OF AUTHORITY, WHICH MUST BE CONSTRUED NARROWLY.

The Court should reject a broad reading of Section 224 because the statute is a measured attempt by Congress to deal with a discrete problem.

The AEPSC Brief ably describes the background to the enactment of Section 224 and its subsequent amendment by the Telecommunications Act of 1996. AEPSC'S recitation of Congress's incremental approach demonstrates several important points:

1. The mere fact that certain facilities might be useful in the provision of telecommunications services is not enough to give the Commission the power to regulate either such facilities or their owners. The Commission itself recognized this in *California Water & Tel. Co.*, 64 F.C.C.2d 753, 758 (1977), and Congress concurred when it enacted Section 224. S. Rep. No. 95-580, at 14 (1977), reprinted in 1978 U.S.C.A.A.N. 109, 122 ("*Senate Report*").

2. From the previous point it follows that the Commission has no authority over entities that are not engaged directly in the provision of telecommunications services or some other aspect of the communications industry, such as broadcasting. The Commission may only regulate the persons and matters addressed in the Communications Act and has no authority over the real estate industry. *See Regents of University System of Georgia v. Carroll*, 338 U.S. 586 (1950); *Radio Station WOW v. Johnson*, 326 U.S. 120

(1945); *Illinois Citizens Committee for Broadcasting v. FCC*, 467 F.2d 1397, 1400 (7th Cir. 1992).

3. It also follows that the Commission's ancillary jurisdiction does not extend to persons engaged in other lines of business, such as the generation and transmission of electricity. Otherwise, there would be no limit to the types of entities subject to the Communications Commission's powers, and Section 224 would not have been necessary. *See Illinois Citizens Committee*, 467 F.2d at 1400. For example, the Commission does not have the power to direct automobile manufacturers to install cellular telephones in every vehicle they make, or to modify their design specifications to conform to the wishes of the telecommunications industry.

4. Congress recognized that allowing the Commission to regulate pole attachments might inadvertently raise additional issues, and Congress consequently strictly limited the scope of the new grant contained in Section 224. Congress desired to promote the growth of the cable television industry, and therefore wanted to ensure that cable operators were not prevented from using existing wireholding facilities, but that was all. The statute thus was carefully drafted to achieve two specific, narrow goals: establishing a mechanism for reviewing pole attachment practices, and protecting the cable television industry from unreasonable or unjust pole attachment practices. *Senate Report* at 14, 1978 U.S.C.A.A.N. at 127. The Commission's new authority was "strictly circumscribed" in various ways. First, the burdens of the statute were placed only on telephone companies, electric companies, and other utilities that make pole space available

to cable companies. *Id.* at 15-16, 1978 U.S.C.A.A.N. at 123-24: Second, the only property to be affected was space "that has been designated and is actually being used for communications services by wire or cable." *Id.* at 15, 1978 U.S.C.A.A.N. at 123. Third, the Commission was only permitted "to involve itself in arrangements affecting the provision of utility pole communications space to CATV systems." *Id.* The Commission was not to concern itself with regulating "access and charges for use of public and private roads and rights-of-ways essential for the laying of wire," "access and rents for antenna sites," "problems pertaining to restrictive easements of utility poles and wires over private property," "exercise of rights of eminent domain," "assignability of easements" or "other acquisition of rights-of-way." *Id.* at 16, 1978 U.S.C.A.A.N. at 124. Finally, neither the statute nor the legislative history express any intent to regulate the installation of cable television or other wireline facilities inside buildings. The emphasis is almost entirely on poles, with some brief discussion of ducts and conduits (which are described in the legislative history as "underground reinforced passages").[11]

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[11] *Id.* at 26, 1978 U.S.C.A.A.N. at 134. The title of Section 224 itself indicates that Congress was primarily concerned with attachments to poles. Indeed, the legislative history noted that 95% of the plant in question consisted of poles, with the rest underground. *Id.* at 12, 1978 U.S.C.A.A.N. at 120. In other words, the problem being addressed by Congress had to do with outside plant. The references to ducts and conduits were needed to address those cases in which plant was installed underground, and the reference to rights-of-way was needed to ensure the cable companies

5. The 1996 amendments to Section 224 extended the benefits of the statute to telecommunications providers (other than incumbent local exchange carriers), but did nothing to alter the types of facilities subject to the burdens of the statute.

Despite this complete lack of Congressional intent to subject property owners to Commission regulation, the Real Estate *Amici* have been forced to devote over two years and considerable expense to fending off just that threat. Nevertheless, the Real Estate *Amici* believe that the Commission's interpretation of Section 224 as applying to pathways inside buildings was incorrect and unjustified, and the threat of future extension of that ruling remains.

Indeed, the *Competitive Networks Order* already creates the possibility that the Commission's extension of Section 224 to pathways inside buildings creates a *per se* taking under the rule of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (cable attachment to apartment building held to be a taking). That is one reason the Alliance has sought reconsideration. And the Commission has yet to rule on the question of whether Section 224 allows telecommunications providers access not just to defined utility pathways, but to any part of a building. Such a ruling would clearly raise Fifth Amendment concerns. The Wireless *Amici* argue that a fixed wireless carrier "must install wires through a building that connect its rooftop wireless antenna to its in-building customer ...." Wireless Brief at 16. Any decision by the Court that adopts such a factual basis, or a legal theory dependent on it, will raise the same Fifth Amendment issues that are currently before the Commission. Accordingly, the Court should construe Section 224 narrowly and reject that theory entirely.

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had the right to enter the real estate on which the poles, ducts and conduits were located.

II. SECTION 224 DOES NOT APPLY TO ATTACHMENTS OF WIRELESS FACILITIES.

The Court of Appeals properly held that Section 224 does not confer benefits on persons seeking to attach wireless facilities. Neither the text of the statute nor the legislative history support any other conclusion: as the Court of Appeals noted, the policy underlying Section 224 was a desire to prevent utilities from charging monopoly rents for the use of their "bottleneck" facilities. *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1274 (11th Cir. 2000), *reh'g en banc denied*, 226 F.3d 1120 (11th Cir. 2000) *cert. granted*, 121 S. Ct. 879 (2001). Because wireless equipment can be located on buildings, antenna towers, streetlight stanchions, and numerous other places, utility poles are not bottleneck facilities for wireless equipment. Indeed, one of the chief advantages of wireless technology is that it is not dependent on connected, linear rights-of-way, and can be installed in many more places than wireline equipment. Therefore, users of wireless equipment do not need the assistance provided by Section 224. They might like it; they might want it; they might benefit from it greatly. But from the beginning Section 224 was to be a minimal grant of

power, and a minimal intrusion on the rights of utilities. Accordingly, it should not be expanded without a clear directive from Congress.

Both the Federal Petitioners and the Wireless *Amici* object to the Eleventh Circuit's use of the term "bottleneck facilities," on the grounds that it does not appear in the text of Section 224. Federal Petitioners' Brief at 34; Wireless Brief at 11. This is meaningless, of course, since the underlying policy is clear. And we note that the word "wireless" never appears in Section 224, either. The Federal Petitioners and the Wireless *Amici* argue that because the definition of "pole attachment" includes attachments by "provider[s] of telecommunications services," and because wireless carriers provide telecommunications services, they are entitled to the benefits of Section 224. This is true. But the real issue is not whether Section 224 applies to wireless carriers, but for what purpose any carrier is entitled to rely on Section 224. The definition of "pole attachment" does not address that question, much less answer it. The answer lies in the definition of "utility," which specifically refers to poles and other facilities used "for wire communications," 47 U.S.C. § 224(a)(1), and the definition of "usable space," which refers to "wires, cables, and associated equipment." 47 U.S.C. § 224(d)(2). These are the only two places in the statute that describe the *type* of equipment that may be attached, and neither refers to wireless facilities.

The Federal Petitioners counter this argument by saying that once a pole or other facility comes under the Commission's jurisdiction for one purpose, the Commission can regulate that facility in any way it

sees fit. Federal Petitioners' Brief at 33. Therefore, according to the Government, even if Congress meant for the authority to regulate attachments to apply only to wireline equipment, the Commission can extend that authority because the definition of "pole attachment" in Section 224(a)(4) does not expressly exclude wireless equipment. This might be a good argument if it were not clear that Congress never even thought about wireless attachments; the entire purpose of the statute was to deal with wireline attachments. The Government tries to duck that point by claiming that Congress's policy concerns are essentially irrelevant: If the statutory language can be read as giving the Commission more power than Congress intended, then the Commission can exercise that power. Federal Petitioners' Brief at 33-34. But Congress cannot inadvertently delegate its authority. It is a fundamental principle that a statute must be read in light of the intent of Congress in enacting the statute, and the policy being addressed by the statute defines that intent.

The Commission therefore is not entitled to deference under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The statute must be interpreted in a fashion that considers the underlying policy in discerning the meaning of the literal words.[12] As the Court stated in *Dunn v.*

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[12] As further discussed *infra*, the *Pole Attachments Order* does not state that it applies to fixed wireless providers, or that they have siting needs different from those of mobile wireless companies. *Chevron* deference is not due "where an agency itself has articulated no position on [a] question." *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988).

Commodity Futures Trading Commission, 519 U.S. 465, 478 (1997), "[w]hile that may not be the only possible reading of the literal text ... our interpretation is faithful to the 'contemporary legal context' in which the [statute] was drafted." In that case, the Court held that the agency was not entitled to *Chevron* deference because in reading the statute as a whole and considering the evolution of Congress's policy goals it was evident that a broader reading was required. In this case, the reading given Section 224 by the Court of Appeals is consistent with the limited grant of power Congress made to allow the Commission to regulate entities otherwise outside its jurisdiction, and with the fact that the relevant portions of the statute were specifically not amended as part of the broad overhaul of the 1996 Act.

Finally, the Wireless *Amici* stress that Congress meant for the Communications Act to be applied in a nondiscriminatory manner. Wireless Brief at 11. This is a broad overstatement, and ultimately unavailing. There is generally little Congress can do to alter the fundamental differences between technologies. Each has its advantages and disadvantages, largely dictated by the laws of physics. The law simply cannot account for all of these differences, and neither the Commission nor the Court should presume that Congress meant to do so without pointing to a specific statutory provision. In this case, there is no question that Congress was originally concerned about the attachment of wireline facilities to wireholding facilities, and the 1996 Act did not alter the relevant language in Section 224. Broad policy statements favoring nondiscrimination do not trump the specific policy embedded in the strict language of the statute.

III. THE COURT OF APPEALS SHOULD BE UPHELD BECAUSE THE FEDERAL PETITIONERS AND THE WIRELESS AMICI RELY ON FACTS INTRODUCED AND POLICIES ADDRESSED NOT IN THE ORDER UNDER REVIEW, BUT IN A COLLATERAL PROCEEDING.

Both the Commission and the Wireless *Amici* argue that the Court of Appeals incorrectly assumed that wireless equipment can be attached to a broad range of structures, apparently -- according to the Commission and the Wireless *Amici* -- failing to recognize that fixed wireless providers may require access to a particular location (such as a rooftop or other site that gives them access to a particular building) to serve customers at that location. Wireless Brief at 15; Federal Petitioners' Brief at note 12. This argument must be rejected. Not only was the Eleventh Circuit's decision proper based on the record before it, but the Federal Petitioners and the Wireless *Amici* are attempting to introduce for the first time findings from a collateral proceeding. This effort violates the rule of *SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

The Commission's *Pole Attachments Order* never distinguishes between different types of wireless providers. The only description of wireless providers in the *Order* is the statement that "cellular telephone, mobile radio, and PCS are telecommunications serv-

ices." 13 FCC Rcd 6777 at ¶ 40. Those services are all mobile services, which do not depend strictly on connections to specific locations or poles. The *Pole Attachments Order* goes on to describe the type of equipment involved as "an antenna or antenna clusters, a communications cabinet at the base of the pole, coaxial cables connecting antennas to the cabinet, concrete pads to support the cabinet, ground wires and trenching, and wires for telephone and electric service." *Id.* at ¶ 41. This is an accurate description of the equipment typically used by a cellular or PCS operator, and there is nothing in the *Pole Attachments Order* that would indicate that the Commission intended Section 224 to apply more broadly than to providers operating the types of equipment referred to in the Eleventh Circuit's decision. The *Pole Attachments Order* does not acknowledge the existence of fixed wireless providers, much less that they have different siting requirements than other wireless providers. Consequently, the Court of Appeals was entirely justified in its conclusion about the types of facilities to which the Commission was seeking to give access.

More fundamentally, this argument presumes that Section 224 applies to privately-owned buildings and facilities inside such buildings, because unlike mobile wireless companies, fixed wireless providers seek access to the sites at which their customers are located. But that point was not addressed in the *Pole Attachments Order* and was not briefed before the Court of Appeals. Indeed, the Commission only ruled to that effect in the *Competitive Networks Order*, six months after the Eleventh Circuit's decision.

The Federal Petitioners and the Wireless *Amici* simply ignore this issue.[13] But the Government cannot rely on facts found in a collateral proceeding to justify the *Pole Attachments Order*. The *Pole Attachments Order* is entirely silent on the siting needs of fixed wireless providers, and as noted *supra* the scope of its discussion appears to limit the issue to mobile providers. "Not having discussed the possibility, the agency submitted no reasons at all." *Motor Vehicle Mfrs Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 49-50 (1983). An agency order may not be affirmed on a rationale not relied on by the agency in its order. The arguments of the *Federal Petitioners* and the Wireless *Amici* are impermissible, *post hoc* rationalizations of counsel. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-169 (1962). This effort also violates the Administrative Procedure Act,

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[13] Federal Petitioners cite certain statements in the *Competitive Networks NPRM*, which issued in June 1999, but do not refer to the October 2000 *Competitive Networks Order*. Federal Petitioner's Brief at n.12. The Wireless *Amici* cite the *Competitive Networks Order*, but fail to show that the facts for which they cite that order were part of the record in the February 1998 *Pole Attachments Order*. Wireless Brief at 15-16. In any case, although the wireless industry may have made that argument, it also appears that the Commission implicitly rejected it at the time. Not only does the *Pole Attachments Order* fail to discuss Wireless *Amici's* interpretation of Section 224, but the Commission's decision to seek comment on the issue in the *Competitive Networks NPRM* the following year indicates that the Commission knew it did not have an adequate record in the *Pole Attachments* proceeding to support that reading of Section 224.

5 U.S.C. § 553, because the *Pole Attachments NPRM* did not give fair notice that the application of Section 224 to in-building pathways would emerge on appeal.

This case is not the proper forum for addressing the application of Section 224 inside buildings because of its enormous ramifications for the real estate industry, and because the Commission has been asked to reconsider the *Competitive Networks Order*. The decision of the Court of Appeals was correctly based on the record before it, and it should be upheld.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

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APPENDIX

APPENDIX
MEMBERS OF THE REAL ACCESS ALLIANCE

- The Building Owners and Managers Association, International ("BOMA International") is an international federation of 101 local associations. BOMA International's 17,000 members own or manage more than 8.5 billion square feet of downtown and suburban commercial properties and facilities in North America and abroad. The mission of BOMA International is to advance the performance of commercial real estate through advocacy, professional competency, standards and research.
- The Institute of Real Estate Management ("IREM") educates real estate managers, certifies the competence and professionalism of individuals and organizations engaged in real estate management, serves as an advocate on issues affecting the industry, and enhances and supports its members' professional competence so they can better identify and meet the needs of those who use their services. IREM was established in 1933 and has 10,000 members across the country.
- The International Council of Shopping Centers ("ICSC") is the trade association of the shopping center industry. Its 38,000 members in the United States, Canada, and more than 70 other countries represent own-

ers, developers, retailers, lenders, and all others having a professional interest in the shopping center industry. ICSC's 34,000 United States members represent almost all of the 43,661 shopping centers in the United States.

- The Manufactured Housing Institute is the leading national trade association for manufactured housing. It represents all segments of the industry, including manufacturers, component suppliers, retailers, community owners and operators, state associations, and those financial institutions involved in the lending and insuring of manufactured homes.
- The National Apartment Association ("NAA") has been serving the apartment industry for 60 years. It is the largest industry-wide, nonprofit trade association devoted solely to the needs of the apartment industry. NAA represents approximately 27,600 rental housing professionals holding responsibility for more than 4.38 million apartment households nationwide.
- The National Association of Home Builders ("NAHB") is a federation of more than 800 state and local home builder associations nationwide, working to enhance the political climate for housing and for the building industry, and promoting policies that keep housing a national priority. NAHB's members are engaged in all aspects of real estate development, ownership, and management,

and include owners and managers of apartment buildings, condominiums, cooperatives, and community associations. NAHB is comprised of over 203,000 members, who collectively employ over eight million Americans.

- The National Association of Industrial and Office Properties ("NAIOP") is the trade association for developers, owners, and investors in industrial, office, and related commercial real estate. NAIOP is comprised of over 9,500 members in 46 North American chapters and offers its members business and networking opportunities, education programs, research on trends and innovations, and strong legislative representation.
- The National Association of Real Estate Investment Trusts is the national trade association for real estate investment trusts (REITs) and publicly-traded real estate companies. Its members are REITs and other businesses that own, operate, and finance income-producing real estate, as well as those firms and individuals that advise, study and service those businesses.
- The National Association of Realtors ("NAR") is the nation's largest professional association, representing more than 720,000 members. Founded in 1908, the NAR is composed of residential and commercial realtors who are brokers, salespeople, property managers, appraisers, counselors and

others engaged in all aspects of the real estate industry. The association works to preserve the free enterprise system and the right to own, buy, and sell real property.

- The National Multi-Housing Council ("NMHC") represents the interests of the larger and most prominent firms in the multi-family rental housing industry. NMHC's members are engaged in all aspects of the development and operation of rental housing, including the ownership, construction, finance, and management of such properties.
- The Real Estate Roundtable ("RER") provides Washington representation on national policy issues vital to commercial and income-producing real estate. RER addresses capital and credit, tax, environmental, technology and other investment-related issues. RER members are senior executives from more than 200 U.S. public and privately owned companies across all segments of the commercial real estate industry.

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IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, *et al.*,
Petitioners,

v.

GULF POWER COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* UNITED TELECOM COUNCIL AND EDISON ELECTRIC INSTITUTE IN SUPPORT OF RESPONDENTS

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the provisions of the Pole Attachments Act apply to attachments by cable television systems that are simultaneously used to provide high-speed Internet access and conventional cable television programming.

2. Whether those provisions of the Pole Attachments Act apply to attachments by providers of wireless telecommunications services no less than to attachments by providers of wireline telecommunications services.

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BRIEF OF *AMICI CURIAE*
UNITED TELECOM COUNCIL
AND
EDISON ELECTRIC INSTITUTE
IN SUPPORT OF RESPONDENTS

PRELIMINARY STATEMENT [1]

The United Telecom Council ("UTC") and the Edison Electric Institute ("EEI") respectfully submit this brief as amici curiae, pursuant to Rule 37 of the Rules of this Court, in support of Respondents.

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[1] In accordance with this Court's Rule 37.6, UTC and EEI respectfully state that this brief was authored entirely by counsel for the named *amici curiae* identified on the cover and signature pages hereof, and that no person or entity not identified as a party to this brief made a monetary contribution to the preparation or submission of the brief. In accordance with this Court's Rule 37.3(a), this brief is accompanied by the written consent of all the parties.

INTEREST OF UTC AND EEI

UTC and EEI are trade associations, whose members include utilities that are required by Section 224 of the Communications Act of 1934 to provide nondiscriminatory access for telecommunications providers and cable television systems for pole attachments, as defined by Section 224(a)(4). UTC and EEI have participated from the beginning in the proceedings that ultimately led to the present appeal. They have also participated in other administrative proceedings and judicial actions concerning the federal regulation of pole attachments. As such, UTC and EEI are pleased to provide the perspective of the industry concerning the two questions that are currently before the Court in this matter. The participation of UTC and EEI as amici curiae will be helpful to the Court to provide the perspective of the electric and other power utility industry concerning pole attachment regulations and to provide further information concerning pole attachments and industry practices and trends.

The United Telecom Council is the trade association for the telecommunications and information technology interests of electric, gas, water and steam utilities, pipeline companies and other critical infrastructure industries worldwide. The members of UTC include investor-owned, municipal and cooperatively-organized utilities. UTC seeks to provide a favorable business, regulatory and technological environment for companies that own, manage or provide critical infrastructure telecommunications systems in support of their core businesses.

The Edison Electric Institute is the association of the United States investor-owned electric utilities and industry associates worldwide. Its U.S. members are in 49 states and the District of Columbia, and serve over 90 percent of all customers served by the shareholder segment of the U.S. industry. EEI frequently represents its U.S. members before

Federal agencies, courts, and Congress in matters of common concern.

FACTUAL BACKGROUND

UTC and EEI stress to the Court that the statute is clear. Congress did not grant an unlimited right of access to utility poles, ducts, conduits and rights-of-way, in particular for the attachment of wireless telecommunications equipment and cable television equipment used to provide Internet access. Instead, Congress quite specifically granted only a limited right for attachments either used solely to provide cable television service, or to provide telecommunications services by wire. Granting a broader right of access than intended by Congress is not permitted, would unjustifiably expand federal jurisdiction over facilities regulated by the states, and would increase costs that must be borne by electricity customers. For these reasons, the Eleventh Circuit decision is entirely proper.

Congress knew that electric utilities are heavily regulated by the states and the federal government. In particular, the states have primary jurisdiction over the utility facilities at issue in this case. Congress recognized that the Federal Communications Commission ("FCC") had no expertise in regulating utilities or utility infrastructure. Therefore, Congress gave the FCC jurisdiction over utility infrastructure only to the absolute minimum extent necessary to accomplish the express, limited purposes of the statute.

The majority of what are commonly referred to as "telephone poles" are actually owned by electric utilities, and under the regulatory jurisdiction of the states as retail "distribution" facility.[2] While some of those poles are in fact

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[2] Comparison of the "Equivalent Number of Poles" reported by the Regional Bell Operating Companies ("RBOCs") in 2000 and the total overhead pole-miles of distribution line reported by the Utility Data Institute ("UDI") in 2000 for U.S. investor-owned utilities ("IOUs"). *See* ARMIS Data Retrieval System, 43-08: Table 1a. Outside Plant Statistics-

used by telephone companies (especially incumbent local exchange carriers, or "ILECs"), the ownership is most often solely or primarily in the hands of electric utilities.[3] Further, it is the understanding of the electric utility industry that attaching entities are becoming more reliant on utilities for pole infrastructure.[4] Electric utilities must control their poles in order to ensure the safe and reliable delivery of electric service to the public, as required by state law,[5] as well as the National Electric Safety Code.[6] In addition, it is the general

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Cable and Wire Facilities at http://gullfoss2.fcc.gov/cgi-bin/websql/prod/ccb/armis1/forms/43-08/frame1a.hts, visited May 30, 2001. *See also* Utility Data Institute, McGraw-Hill Energy Directory of Electric Power Producers and Distributors (108th ed. 2000). According to the UDI, there were 17,956,500.68 distribution line pole-miles reported by IOUs. Based on a weighted average number of 28.5 poles per mile, IOUs own approximately 511,760,269 distribution poles. RBOCs reported only 17,624,190 "equivalent" poles.

[3] Based on an informal survey by EEI of its investor-owned utility members in 2001. The survey indicated that utilities own between 63% and 74% of the poles that are, or are likely to be used for pole attachments.

[4] *Id., compare* S. Rep. No. 95-580 at 13, *reprinted in* 1978 U.S.C.C.A.N. at 121 (finding that "[o]f the more than 10 million poles on which cable operators lease space, fewer than half are controlled by telephone companies, while 53 percent are controlled by power utilities, public and private.") Compare to the current figure in Note 3, above.

[5] *See e.g.* Mich. Comp. Laws Ann. § 46.10p(5)-(8)(West 2001); N.J. Stat. Ann. § 48:2-23 (West 2001); Ohio Rev. Code Ann. § 4928.10 (Anderson 2001); Or. Rev. Stat. § 757.649(2) (1999); Tex. Util. Code Ann. § 38005(a) (West 2000).

[6] The National Electrical Safety Code(R) ("*NESC*"), published by the Institute of Electrical and Electronics Engineers, Inc. adopts certain standards that cover basic provisions for safeguarding persons from hazards arising from the installation, operation, or maintenance of certain overhead and underground electric supply and communication lines. *NESC*, 1997 Edition (published August 1, 1996) Abstract and § 1, p. 1. Although the *NESC* is a voluntary standard, portions have been adopted,

practice of the industry that revenues generated from pole attachments are rolled-back to the ratepayers in the form of rate reductions in the cost of pole plant.

Most investor-owned utilities have not entered the retail telecommunications marketplace; those that offer telecommunications are becoming carrier's carriers that do not compete directly with cable or telecommunications service providers.[7] Moreover, as carrier's carriers, utilities facilitate the end-customer communications services of other carriers.[8] Therefore, electric utilities welcome the opportunity to provide pole attachments in order to facilitate the delivery of such services. However, regulated access and rates for cable modem or wireless telecommunications services are neither necessary under nor required by Section 224.

COUNTERSTATEMENT OF THE CASE

UTC and EEI adopt the statement of the case set out in Respondents' Brief and offer the following supplemental points in support of the argument that follows.

1. In 1978, Congress gave the FCC regulatory oversight only of the arrangements between utilities and community antenna television ("CATV") systems. S. Rep. No. 95-580,

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with or without changes, by some state and local jurisdictional authorities. *NESC*, p. vi.

[7] *Investor Owned Utilities with Telecommunications Subsidiaries*, UT Digest At-A-Glance (Pike and Fisher, Inc.), Apr. 2001 at 2-12. (reporting that only 55 of the approximately 200 North American investor-owned utilities are currently offering or are developing telecommunications services.)

[8] *See e.g. In the Matter of Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, 13 FCC Rcd 18025, 18086-87 (1998) (rejecting argument that carrier's carrier that also provided service to end users would discriminate against unaffiliated carriers seeking capacity).

95th Cong., 1st Sess., at 15, *reprinted in* 1978 U.S.C.C.A.N. 109, 123 ("1977 Senate Report"). The agency was not authorized to prescribe rates, terms and conditions for CATV systems generally. *Id.* Instead, the "basic design" of the 1978 Act was meant to be accomplished in "the most direct and least intrusive manner." *Id.* As such, Congress emphasized that, among other things, the FCC would not "regulate access and charges for . . . rents for antenna sites." S. Rep. No. 95-580 at 16, *reprinted in* 1978 U.S.C.C.A.N. at 124. Moreover, "the term 'pole attachment' [was] defined to mean the attachment *of cables* of a CATV system to a pole or occupation of a duct or conduit or other right-of-way owned or controlled by a utility." S. Rep. No. 95-580 at 26, *reprinted in* 1978 U.S.C.C.A.N. at 134 (emphasis added). The FCC's authority was "strictly circumscribed", S. Rep. No. 95-580 at 15, *reprinted in* 1978 U.S.C.C.A.N. at 123, and jurisdiction extended "only so far as is necessary" over a "utility", as defined at Section 224(a)(1), that "owns or controls poles, ducts, conduits or rights-of-way, in whole or in part, for any wire communications." 47 U.S.C. § 224(a)(1) (Supp. II 1996).

2. In 1993, the United States Court of Appeals for the District of Columbia Circuit found that Section 224 reasonably could be interpreted to apply to attachments that a cable television system used to provide commingled video and non-video communications. *Texas Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993). It stated that "[t]he basic issue in this case boils down to what Congress meant by the phrase "cable television system." *Id.* at 929. The court agreed with the FCC that Section 224 applied to "any attachment by a cable television system," which was not confined by the definition of a "cable system" that applied only "for purposes of [the Cable Act of 1984]", rather than for purposes of Section 224. *Id.* at 931. Thus, the Court concluded that the Pole Attachment Act of 1978 was

ambiguous and upheld the FCC interpretation of a "cable television system" as reasonable.

3. The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat 56 ("1996 Act"), was the first major overhaul of the Communications Act of 1934, 47 U.S.C. § 151 *et. seq.* ("Communications Act"), and significantly changed the nature of Section 224 by legislating a right of access and separate rates for attachments that are used by a cable television system to provide solely cable service, and those that are used by a non-ILEC telecommunications carrier to provide telecommunications service. Sections 703(d)(3) and (e)(1) of the 1996 Act (codified at 47 U.S.C. §§224(d)(3) and (e)(1)); *See also Gulf Power Co. v. United States*, 187 F.3d 1324, 1328 (1999) ("*Gulf Power I*") ("The Act's mandatory access provision, 47 U.S.C. § 224(f), effects a taking of a utility's property").

The 1996 Act explicitly made the definitions of "cable services" and "cable system" in Section 602 applicable to other provisions in the Act. Sections 3(36)–(37) of the 1996 Act (codified at 47 U.S.C. 153(6)-(7)). Section 602 defines cable service as:

> (A) the one way transmission to subscribers of (i) video programming, or (ii) other programming service, and
>
> (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

Section 602(6) of the Communications Act (codified at 47 U.S.C. § 522(6)). A cable system is defined in relevant part as:

> a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service

> which includes video programming and which is provided to multiple subscribers within a community.

Section 602(7) of the Communications Act (codified at 47 U.S.C. § 522(7)).

The 1996 Act also created a definition for the terms "telecommunication service" and "telecommunications carrier." Telecommunications service was defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." Section 3(48) of the 1996 Act (codified at 47 U.S.C. § 153(46)). A telecommunications carrier was defined in relevant part as "any provider of telecommunications services." Section 3(49) of the 1996 Act (codified at 47 U.S.C. § 153(44)). For purposes of Section 224, the term "telecommunications carrier" does not include any incumbent local exchange carrier ("ILEC") as defined in section 251(h). 47 U.S.C. § 224(a)(5).

Finally, the 1996 Act created a definition for "information services," as the

> offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications service.

Section 3(41) of the 1996 Act (codified at 47 U.S.C. § 153(20)). The FCC has declared that Internet services are "appropriately classed as information, rather than telecommunications, services," noting that "the functions and services associated with Internet access were classed as information services under the modified final judgment," and that "the Commission has consistently classed such services as electronic mail and voice mail as enhanced services," prior

to the 1996 Act. *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11536-57 (1998) ("*Universal Service Report to Congress*").

4. In 1998, the FCC promulgated rules implementing the 1996 Act amendments to Section 224. *In re Implementation of Section 703(e) of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 6777 (1998) (codified at 47 C.F.R. §§ 1.1401—1.1418 (1999)) ("Report and Order"). The FCC interpreted section 224(f) (added by the 1996 Act) to require that utility companies provide pole attachments to cable television systems for Internet services at the prevailing rate for attachments used to provide solely cable service. *Id.* at 6795-96. It also interpreted the language of section 224(a)(4), which states that pole attachment meant *any* attachment by a telecommunications carrier, to mean that utilities must provide pole attachments for wireless communications equipment. *Id.* at 6798-99.

5. In 2000, the United States Court of Appeals for the Eleventh Circuit rejected the FCC's interpretation of the 1996 Act amendments pertaining to attachments used to provide Internet services and attachments for wireless communications equipment. It recognized that Section 224 "emphasizes the type of service [instead of] the type of entity acquiring the attachment," as a result of the 1996 Act amendments, and that the basis for regulating attachments for Internet services that was enunciated first in *Texas Utilities Electric Co.* no longer applied. *Gulf Power Co. v. FCC*, 208 F.3d 1263, 1277 n. 32 (11th Cir. 2000) ("*Gulf Power II*"). It also recognized that the jurisdictional nexus "for any wire communications" did not reach attachments for wireless communications equipment. *Id.* at 1273-74. It concluded that regulating wireless attachments would be contrary to the underlying purpose of Section 224, "to prevent the telephone and power companies from charging monopoly rents to

connect to their bottleneck facilities." The Court reasoned that "[utility] poles are not bottleneck facilities for wireless carriers," because wireless "equipment can be placed on any tall building, and the whole set-up requires more physical space then [sic] a wireline system." *Id.* at 1275.

SUMMARY OF THE ARGUMENT

Section 224 is an expressly limited, exceptional and independent provision within the Communications Act that grants the FCC narrowly circumscribed jurisdiction over utilities for pole attachments used to provide either television-only cable service, or telecommunications service by wire. Within its express terms, only certain utilities that own or control poles, ducts, conduit and rights-of-way used for *wire* communications must provide pole attachments, and then only to purely cable television systems or telecommunications carriers other than ILECs that provide telecommunications services by wire. The FCC must adjudicate pole attachment complaints to ensure that pole attachment rates, terms and conditions are just and reasonable, but it is not authorized to prescribe specific rates. C*f.* Section 201(b) of the Communications Act (codified at 47 U.S.C. § 201(b)). Instead, Section 224 itself sets the range of rates that are just and reasonable for either cable television or telecommunications attachments. 47 U.S.C. §§ 224(d)-(e).

Congress sought to regulate pole attachments in the "least intrusive manner." S. Rep. No. 95-580 at 15, *reprinted in* 1978 U.S.C.C.A.N. at 123. Jurisdiction was established only to the extent that utilities had *voluntarily* negotiated to provide space on the pole for wire communications. At that time, Congress expressly clarified that Section 224 did not authorize the FCC to regulate matters such as antenna siting, and had drafted Section 224(a)(4) to define pole attachments as any attachment "*for wire communication.*" H.R. Rep. No. 94-1630 at 30-3; and H.R. Rep. No. 95-721 at 10 (emphasis

added). The definition of pole attachments was only later changed to any attachment "*by a cable television system*" in order to narrow the class of entities that could benefit, not to imply that Section 224 applied to wireless attachments. *See Texas Utils. Elec. Co. v. FCC*, 997 F.2d at 931.

Even when Congress amended Section 224 to provide for telecommunications carriers, it stipulated that regulated access and rates would only apply to the extent that pole attachments were either used by a cable television system solely to provide cable service, or used by a non-ILEC telecommunications carrier to provide telecommunications services. Thus after 1996, Section 224 emphasizes the services provided rather than service providers. *See Gulf Power II*, 208 F.3d at 1277.

Congress referred to the two types of entities separately, and carefully referred to the services they might provide as separate and distinct from the entities that might provide them. The language Congress used does not imply that cable operators could not provide telecommunications services, or that telecommunications carriers could not provide cable services, but the plain language restricts the benefits available to such "cross-service" providers. In fact, the only manner in which Congress intended to focus on entities rather than services was when it excluded ILECs from coverage under the pole attachment provisions. This is important, because it removed the ambiguity concerning the term "cable television system" which prompted the D.C. Circuit to uphold the FCC's view that Section 224 applies to attachments used to provide data transport. *See Texas Utils. Elec. Co. v. FCC*, 997 F.2d at 929.

Thus, the Eleventh Circuit correctly concluded that the FCC "disregard[s] the unambiguous language of the 1996 Act" when the FCC argues that Section 224(d) or Section 224(b)(1) applies to the rate for cable modem service. *Gulf Power II*, 208 F.3d at 1276. As a result of the 1996 Act

amendments, Section 224 requires that attachments be used by a cable television system solely to provide cable service or by a telecommunications carrier to provide telecommunications services. Cable modem service is certainly not cable service and should be classed as an information service, rather than a telecommunications service.

Cable modem service is not solely cable service, because it does not fit the statutory definition within Section 602(6) that was made applicable to Section 224 by the 1996 Act. Even the FCC has concluded that cable modem does not provide video programming within the meaning of Section 602(6). *In re Internet Ventures, Inc.*, Memorandum Opinion and Order, File No. CSR-5407-L, 15 F.C.C. Rcd 3247, at ¶ 13 (Feb. 18, 2000). Nor, as the Eleventh Circuit noted, does it appear that cable modem service could be construed as the "use of" other programming service. *Gulf Power II*, 208 F.3d at 1276, *citing* 47 U.S.C. §522(6)(B).

Congress also did not intend that cable modem service be included within the definition of telecommunications service. When Congress amended Section 224 to include pole attachments by telecommunications service providers, it was aware of the distinction between basic and enhanced services that the FCC had followed since 1966. *See Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No. 16979, Notice of Inquiry, 7 FCC2d 11 (1966); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, Final Decision, 77 FCC2d 384 (1980); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, CC Docket No. 85-229, Report and Order, 104 FCC2d 958 (1986). The FCC itself recognized that the definitions of telecommunications service and information services that were added by the 1996 Act correspond to the categories of basic and enhanced services,

respectively. Michael Kende, "The Digital Handshake", Office of Plans and Policy Working Paper Number 32, released Sept. 26, 2000, *citing Universal Service Report to Congress*, 13 FCC Rcd at 11536. The functions provided by Internet access services had been classed as a type of enhanced service well before the 1996 Act.

If Congress had intended to change that, and include pole attachments used to provide cable modem Internet services, it could and would have applied the pole attachment provisions to attachments used to provide other types of communications services, such as information services, not only cable or telecommunications services. In fact, the FCC recognized that Congress had adopted the Commission's prior usage, since after passage of the 1996 Act, the Commission classed Internet access as an information service, just as it had previously used the classification of enhanced service.

Some petitioners claim that cable modem should be treated as a telecommunications service, and cite in support *AT&T Corp. v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000). The Ninth Circuit reasoned in *Portland* that cable modem is a telecommunications service to the extent that it transports data to the Internet. *Id.* Thus, *Portland* distinguishes Internet access from Internet services. *Id.* Although reasonable in theory, the FCC has already rejected this rationale in its *Universal Service Report to Congress*. The FCC explained that telecommunications service and information services are "mutually exclusive", and that "a single entity can be both a telecommunications provider and an information services provider, but only in connection with its offering of separate services; it cannot gain that dual status merely as a result of its offering of a single service." *Universal Service Report to Congress*, 13 FCC Rcd at 11,501, 11,520, n. 77.

For the first time, some petitioners also raise Section 706 of the 1996 Act as alternative grounds for regulating pole attachments used to provide Internet services. Section 706

directs the FCC to "encourage the deployment . . . of advanced telecommunications capability to all Americans . . . by . . . regulating methods that remove barriers to infrastructure investment." 47 U.S.C. § 157, statutory note. The authority provided by Section 706 requires the FCC to initiate a notice of inquiry concerning the availability of advanced telecommunications capability. If the Commission finds that deployment is not reasonable and timely, it must take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications markets. *Id.*

The FCC has conducted two inquiries, and both times has concluded that the deployment of advanced telecommunications is reasonable and timely. As such, it has never exercised its authority, let alone identified pole attachments as a barrier to infrastructure investment. It is also doubtful that Congress intended the general authority of Section 706 to subsume the specific authority conferred elsewhere in the Communications Act, particularly within Section 224, which has always been "strictly circumscribed" and independent from the FCC's general authority in Section 2(a). *See* S. Rep. No. 95-580 at 15, *reprinted in* 1978 U.S.C.C.A.N. at 123 (explaining that "the provision of pole space was not considered 'wire or radio communications' per se or that poles constitute 'instrumentalities, facilities, apparatus,' et cetera incidental to wire communications (as used in section 3(a) of the Communications Act, 47 U.S.C. §153(a))"). In any event, the application of Section 706 to Section 224 is a matter that need not be addressed to resolve the questions presented to the Court.

It is also clear that Section 224 was never intended to apply to attachments for wireless communications equipment. Central to the "basic design" of Section 224 was the jurisdictional nexus established by the provision of pole space

for wire communications. S. Rep. No. 95-580 at 15, *reprinted in* 1978 U.S.C.C.A.N. at 123. As such, Section 224(a) defines a utility as "any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits or rights-of-way used, in whole or in part, *for any wire communications*." 47 U.S.C. § 224(a)(1) (emphasis added). That the statute reaches only wire attachments is further evidenced by the statutory definition of "usable space" as the space above the minimum grade level that can be used for the attachment of wire, cables and associated equipment. 47 U.S.C. § 224(d)(2).

The FCC focuses exclusively upon Section 224(a)(4), but it overlooks the fact that even that provision was intended to mean "the attachment *of the cables* of a CATV system to a pole or occupation of a duct or conduit or other right-of-way owned or controlled by a utility." S. Rep. No. 95-580 at 26, *reprinted in* U.S.C.C.A.N. at 134 (emphasis added). Moreover, the FCC's reliance on Section 224(a)(4) alone is unreasonable, because such a reading would conflict with Section 224(a)(5) by defining pole attachments as "any attachment by a . . . provider of telecommunications service," including an incumbent local exchange carrier. *See* 47 U.S.C. §§224(a)(4) and (a)(5). This vindicates the conclusion of the Eleventh Circuit that sections 224(a)(4) and 224(a)(1) must be "read in combination . . . to give the FCC authority to regulate attachments to poles, used at least in part, for wire communications, and by negative implication does not give the FCC authority over attachments to poles for wireless communications." *Gulf Power II*, 208 F.3d at 1274.

Nor would regulating pole attachments for wireless communications equipment be consistent with the purpose of the statute. Congress sought to counter the "superior bargaining position" that utilities allegedly held "[d]ue to the local monopoly in ownership or control of poles to which cable system operators, out of necessity or business convenience,

must attach their distribution facilities." S. Rep. No. 95-580 at 13, *reprinted in* 1978 U.S.C.C.A.N. at 121. "To prevent the power companies from taking unfair advantage of their bottleneck facilities in this manner, Congress brought them under the FCC's regulatory umbrella." *Gulf Power II*, 208 F.3d at 1274. The Eleventh Circuit recognized that "poles are not bottleneck facilities for wireless carriers," because "most of [the] equipment can be placed on any tall building," and "wireless systems operate in a completely different way than do wireline systems," by "transmit[ing] through a series of concentric circle emissions that allow the network to continue working if one antenna malfunctions." *Id.* Linear utility rights-of-way are simply irrelevant to the needs of wireless carriers. As such, a right of access for wireless attachments is unnecessary and would contravene the legislative purpose.

Finally, the structure of the 1996 Act also precludes interpreting Section 224 to regulate attachments for wireless communications equipment. The 1996 Act amendments to Section 224 immediately precede a separate provision in the 1996 Act entitled "National Wireless Telecommunications Siting Policy." See Section 704(a) of the 1996 Act (codified at 47 U.S.C. § 332(c)(7)(A) (Supp. II 1996). This provision specifically preserves local zoning authority over the "regulation of the placement, construction and modification of personal wireless service facilities." *Id.* It would contradict the preservation of local zoning authority in Section 704, if Congress had intended a federal right of access for wireless pole attachments to apply in Section 703.

ARGUMENT

I. POLE ATTACHMENTS BY CABLE TELEVISION SYSTEMS THAT ARE USED TO PROVIDE INTERNET ACCESS FALL OUTSIDE THE SCOPE OF SECTION 224.

A. Section 224 Applies Only to Attachments Used to Provide Cable Service or Telecommunications Service.

Although an agency interpretation of an ambiguous or silent statute is entitled to deference, when the statute clearly addresses the issue at hand that is the end of the matter. *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 842-843 (1984). Moreover, on a matter of pure statutory construction, the courts must determine congressional intent using traditional tools of statutory construction. *NLRB v. United Food and Commercial Workers Union Local 23*, 484 U.S. 112, 123 (1987). If the court finds that the agency's interpretation goes beyond the limits of what is ambiguous and contradicts what is clear, no such deference is due. *See Whitman v. American Trucking Ass'ns.*, 121 S. Ct. 903, 917 (2001), *citing AT&T Corp. v. Iowa Utils. Bd.* 525 U.S. 366, 392 (1999).

Section 224 provides that utilities must provide nondiscriminatory access for pole attachments at rates, terms and conditions that are "just and reasonable". Just and reasonable rates apply only for attachments used by a cable television system to provide solely cable services or by a telecommunications carrier to provide telecommunications services. 47 U.S.C. §§ 224(d)-(e). Although pole attachments include "any attachment by a cable television system or provider of telecommunications service," this definition cannot possibly be the sole touchstone for the FCC's authority. 47 U.S.C. § 224(a)(4). While an ILEC certainly is a "provider of telecommunications service", it is

not entitled to pole attachments, because it is not a telecommunications carrier for purposes of Section 224. 47 U.S.C. § 224(a)(5). Therefore, the FCC's construction of Section 224 is inherently flawed, because it is plain that Section 224(a)(4) includes pole attachments to which the general authority of Section 224(b)(1) never applied. *Report and Order*, 13 FCC Rcd at 6795-6796, *See also* Gov't. Br. at 15.

Meanwhile, "the straightforward language of subsections (d) and (e) directs the FCC to establish two specific just and reasonable rates . . . for cable television systems providing solely cable service and . . . for telecommunications carriers providing telecommunications service." *Gulf Power II*, 208 F.3d at 1276, n.29. Not only are these the only rates authorized, but they "narrow (b)(1)'s general mandate to set just and reasonable rates" and (f)(1)'s mandate to provide nondiscriminatory access. *Id; but see* Gov't Br. at 19 *and* Brief of Petitioner at 35-39. Under this reading, a utility must provide—at rates, terms and conditions that are just and reasonable—any attachment to a pole, duct, conduit or right of way that it owns or controls that is used by a cable television system solely to provide cable service or used by telecommunications carriers to provide telecommunications services. Hence, this construction gives meaning to Section 224 as a whole rather than focusing on isolated words or phrases. *See e.g. United States v. Morton*, 467 U.S. 822, 828 (1984)("We do not, however, construe statutory phrases in isolation; we read statutes as a whole.")

B. Cable Modem Service is Neither a Cable Service Nor a Telecommunications Service.

The FCC disregards the unambiguous language of the 1996 Act when it asserts that Internet service provided by a cable television system is either solely cable service or is subject to regulation under section 224(b)(1)'s mandate to ensure that the rates, terms, and conditions for pole attachments are just

and reasonable. *Gulf Power II*, 208 F. 3d at 1276. Cable modem Internet access is certainly not solely cable service as specified in Section 224(d)(3), nor should Section 224(e) necessarily apply, simply because Internet access services may include a telecommunications component.

Congress understood the distinction between basic and enhanced services, and codified it by classifying "telecommunications services" separate from "information services". *Compare* 47 U.S.C. 153(46) *with* 47 U.S.C. 153(20). That these classes were codified in the 1996 Act supports the conclusion that Congress did not mean for Section 224(e) to apply to attachments used to provide Internet services. It is doubtful that Congress overlooked an entire class of services when it amended Section 224. As such, Section 224 must be construed only to apply to attachments by a cable television system for solely cable service or by a telecommunications carrier for telecommunications service.

Although the Ninth Circuit has recently arrived at the novel conclusion that Internet services provided by a cable television system are telecommunications services for jurisdictional purposes of state and local franchise regulation, that says nothing about congressional intent in regards to Sections 224(d) and (e). Absent a contrary indication, congressional intent is manifested by the ordinary and common sense meaning of the express terms of the statute. *Park' N Fly, Inc. v. Dollar Park & Fly, Inc.*, 169 U.S. 189, 194 (1984). As such, this court should not apply the novel theory that Congress might have considered cable modem service to be a telecommunications service within the meaning of Section 224(e)(1).

Certainly, the FCC has remained coy on the precise classification of cable modem services, but it has generally concluded that Internet access services are "appropriately classed as information, not telecommunications, services." *Universal Service Report to Congress*, 13 FCC Rcd at 11536-

57, *but see Id.* at 11535, n. 140 (noting that "[w]e express no view in this Report on the applicability of this analysis to cable operators providing Internet access service.") Moreover, it has determined that cable modem service does not provide video programming for purposes of Section 612 of the Communications Act, 47 U.S.C. § 532. *In re Internet Ventures, Inc.*, Memorandum Opinion and Order, File No. CSR-5407-L, 15 F.C.C. Rcd 3247, at ¶ 12-13 (Feb. 18, 2000). Nor may the FCC reasonably conclude that Congress clearly intended to include cable modem service as a form of subscriber interaction when it amended Section 602(6) to apply to the selection "or use" of video programming or other programming service. *See* Section 301(a) of the 1996 Act (codified at 47 U.S.C. §522(6)(B)). *See also Gulf Power II*, 208 F.3d at 1276, *citing*, H. Rep. No. 104-204, at 97, *reprinted in* 1996 U.S.C.C.A.N. at 64. Absent a contrary indication, Section 224 may not reasonably apply to attachments used by a cable television system to provide cable modem service.

C. Excluding Attachments for Cable Modem Service is Entirely Consistent with the Purpose of Section 224 and the 1996 Act.

In a desperate appeal, petitioners argue that Congress could not have intended to penalize cable television systems by excluding attachments for cable modem service. *See* Petitioners Br. at 32; *and see* Gov't. Br. at 20. There are two fallacies bound together within this argument: that the policy goals embodied in Section 706, 47 U.S.C. § 157, statutory note, supplement the authority within Section 224 and that Congress did not mean to place cable television systems at a competitive disadvantage with telecommunications carriers for providing Internet access.

As illustrated by the 1977 Senate Report, the narrow authority within Section 224 has always been "strictly circumscribed" and independent from the FCC's general

authority in Section 2(a). *See* S. Rep. No. 95-580 at 15, *reprinted in* 1978 U.S.C.C.A.N. at 123 (explaining that the provision of pole space was not considered "wire or radio communications" per se or that poles constitute "instrumentalities, facilities, apparatus," et cetera incidental to wire communications (as used in section 3(a) of the Communications Act, 47 U.S.C. §153(a)). *But see* Petitioners Br. at 34-35. Nothing in the 1996 Act or its legislative history evinces a contrary intent from that expressed by the framers of Section 224.

Section 706 entitled, "Advanced Telecommunications Incentives" advocates the same "deregulatory, pro-competitive" approach as the 1996 Act. *See* S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 1 (1996). Section 706(a), 47 U.S.C. § 157, statutory note (a), generally directs the FCC to "encourage the deployment of advanced telecommunications capability . . . by utilizing . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." *Id.* Section 706(b) requires the FCC to conduct inquiries concerning the availability of advanced telecommunications capability, . . . [and to] determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion." 47 U.S.C. 157, statutory note (b). If deployment is not reasonable and timely, it is required to take immediate action by removing barriers to infrastructure investment and promoting competition. *Id.* Thus, Section 706 relies on market forces and calls for FCC action, if, and only if, deployment of advanced telecommunications is not reasonable and timely. *Id.*

The general authority conferred through Section 706 says nothing about its effect on the specific authority conferred elsewhere in the Act. Moreover, "[i]t is a basic principle of statutory construction that a statute dealing with a narrow,

precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. 'Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.'" *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976), *quoting Morton v. Mancari*, 417 U.S. 535, 550-551 (1974). Thus, as a mater of statutory construction, the general authority of Section 706 should not control "the narrow, precise and specific subject" of pole attachments.

The FCC has conducted only two inquiries pursuant to Section 706, both of which have found that deployment is reasonable and timely. See *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Report, CC Docket No. 98-146, 14 FCC Rcd 2398 (1999); *and see* Second Report, 15 FCC Rcd 20913 (2000). Even if Section 706 did control the authority within Section 224, the FCC has never found that deployment is not reasonable and timely, much less that pole attachments are a barrier to infrastructure investment. Hence, the FCC lacks the requisite authority to act pursuant to Section 706.

Alternatively, petitioners couch their arguments in equity, claiming that excluding attachments used to provide cable modem service would unfairly penalize cable television systems that provide Internet access by placing them at a competitive disadvantage with telecommunications providers that provide a similar service. *See* Petitioners Br. at 32; *and see* Gov't Br. at 20. However, "a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that cold provide a rational basis for

the classification." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993). Moreover, "'the Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely [the Court] may think a political branch has acted.'" *Id., quoting Vance v. Bradley*, 440 U.S. 93, 97 (1979) (footnote omitted).

Congress could have decided to treat all attachments by cable television systems and telecommunications carriers the same, but it did not. Instead, it gave cable television systems a more favorable rate for attachments used solely to provide cable service. *Compare* 47 U.S.C. § 224(d)(1) *with* 47 U.S.C. § 224(e)(2). That cable television systems now find themselves on the wrong side of the dividing line when they make attachments that are used to provide cable modem service is a consequence of the decision made by Congress to encourage pole attachments for some services more than others, and for other services not at all. Moreover, cable television systems still enjoy exclusive rights to access "public rights-of-way and through easements ... which have been dedicated for compatible uses." 47 U.S.C. § 541(a)(2). As such, petitioners' equity arguments ring hollow.

II. SECTION 224 DOES NOT APPLY TO ATTACHMENTS OF WIRELESS TELECOMMUNICATIONS EQUIPMENT

It is also clear that Congress did not intend that Section 224 apply to attachments for wireless communications equipment. This conclusion emanates not only from the negative implication of the jurisdictional grant of Section 224(a)(1), but also from other references within the statute, as well as the legislative history, the purpose of the Pole Attachment Act and the structure of the 1996 Act as a whole.

A. Jurisdiction

Section 224(a)(1) establishes the jurisdictional nexus over utilities for the regulation of pole attachments. A utility is only subject to the jurisdiction of the FCC to the extent that is a "local exchange carrier or an electric, gas, water, steam, or other public utility," and it "owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, *for any wire communications*." 47 U.S.C. § 224(a)(1) (emphasis added). Just as reference to wireless communications equipment is clearly excluded from the definition of facilities subject to the statute, so should it be held as excluded from the application of the statute.

B. Other Provisions Within Section 224.

Section 224(d)(1) defines the just and reasonable rate for pole attachments used by a cable television system solely to provide cable service. Such rates are determined based on the amount of pole, duct, conduit or right-of-way space used. 47 U.S.C. § 224(d)(1). Subsection (2) defines the term "usable space" as the space above the minimum grade level which can be used for the attachment of wires, cables and associated equipment. 47 U.S.C. § 224(d)(2). The language used in both subsections does not either address or lend itself to wireless communications systems, indicating that inclusion of wireless communications equipment was not contemplated.

C. Legislative History

As discussed, *supra*, Congress strictly circumscribed the authority within Section 224 to the extent necessary to accomplish its "basic design" in the "most direct and least intrusive manner." S. Rep. No. 95-580 at 580, *reprinted in* 1978 U.S.C.C.A.N. at 123. "Even in this instance [the Pole Attachment Act] does not contemplate a continuing direct involvement by the Commission in all CATV pole attachment arrangements." *Id.*

Moreover, the section-by-section analysis of the 1977 Senate Report, states that "[t]he term 'pole attachment' is defined to mean the attachment *of the cables* of a CATV system to a pole or occupation of a duct or conduit, or other right-of-way owned or controlled by a utility." S. Rep. No. 95-580 at 26, *reprinted* in 1978 U.S.C.C.A.N. at 134. This clearly reveals that Congress did not intend to cover wireless communications equipment.

D. Purpose of the Statute

The Pole Attachment Act was designed to remedy the "superior bargaining position" that various utilities were believed to enjoy over CATV systems "[d]ue to the local monopoly in ownership or control of poles to which cable system operators, out of necessity or business convenience, must attach their distribution facilities." S. Rep. No. 95-580 at 13, *reprinted in* 1978 U.S.C.C.A.N. at 121. "To prevent the power companies from taking unfair advantage of their bottleneck facilities in this manner, Congress brought them under the FCC's regulatory umbrella." *Gulf Power II*, 208 F.3d at 1274.

As the Eleventh Circuit recognized, "poles are not bottleneck facilities for wireless carriers," because "most of [the] equipment can be placed on any tall building," and "wireless systems operate in a completely different way than do wireline systems. *Id.* In fact, wireless communications equipment can be and is placed on buildings, antenna towers, water towers, even streetlight poles, depending on the wireless service to be offered. The provision of wireless siting facilities has become a competitive industry within the larger telecommunications industry, with rates robustly market-based. This is demonstrated by the federal government's own vigorous participation in that market including its demand for full market rates. GSA Bulletin FPMR D-242, 62 Fed.Reg. 32,611 (June 16, 1997) (*extended*, 64 Fed.Reg. 30,523 [June 8, 1999]); GSA Bulletin FPMR D-246, 63 Fed.Reg. 10,631

(Mar. 4, 1998) (*extended*, 64 Fed.Reg. 30,523 [June 8, 1999]). No Congressional protection is needed to assure access to siting facilities for wireless carriers.

When Section 224 was expanded to apply to pole attachments by telecommunications carriers, the express purpose was the same—to allow wireline telecommunications service providers, like the cable television companies before them, to attach to the utilities' bottleneck facilities without having to pay monopoly rents. *See Gulf Power II*, 208 F.3d at 1275, *citing* H. Rep. No. 104-204, at 92 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 58. Such providers generally employ fiber-optic cable to carry telecommunications services, and as such, can make use of utility infrastructure in a manner similar to cable television systems.

E. The Structure of the 1996 Act as a Whole

Section 224 was amended by Section 703 of the 1996 Act. The first provision of the next section, Section 704, is entitled "National Wireless Telecommunications Siting Policy" and immediately preserves "the authority of State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities." Section 704(a)(7)(A) of the 1996 Act (codified at 47 U.S.C. §332(c)(7)(A)). Section 704 goes on to express Congressional intent with regard to the wireless communications equipment siting. No reference is made to the previous section, nor to Section 224. Moreover, Congress's clear intent to protect municipal zoning authority would be nullified should the previous Section of the 1996 Act provide a mandatory right of access to utility infrastructure for wireless communications equipment "attachments."

For all of the above reasons, Section 224 manifestly does not apply to wireless communications equipment; the decision of the Eleventh Circuit should be upheld.

CONCLUSION

This is not a case involving a question of broad Congressional policy as interpreted by an expert agency. Rather, it is a case involving an agency's misapplication of limited, clear legislative language and intent. Congress only saw fit to provide a right of access at just and reasonable rates for pole attachments used by cable television systems to provide solely cable service and by telecommunications carriers to provide telecommunications services. 47 U.S.C. §§ 224(d)-(e). Similarly, it only contemplated the use of utility poles, ducts, conduit and other rights-of-way for communications by wire. 47 U.S.C. § 224(a)(1) *and see* S. Rep. No. 580 at 26, *reprinted in* 1978 U.S.C.C.A.N. at 134. Hence, neither wireless communications equipment nor cable modem service is entitled to regulated rates for pole attachments.

Congress made clear in 1996 that pole attachments need only be provided for non-ILEC services. The 1978 Pole Attachment Act had defined pole attachments as any attachment by a cable television system, misleading the D.C. Circuit and the FCC to conclude that cable television systems could use pole attachments for any service. *See Texas Utils. Elec. Co. v. FCC*, 997 F.2d at 936. The 1996 Act amendments instead emphasized the services that must be provided by pole attachments, eliminating the ambiguity that had permitted an expansive interpretation of pole attachments based upon Section 224(a)(4) alone. *See Gulf Power II*, 208 F.3d at 1277.

That Section 224(a)(4) may not be read in isolation after 1996 is made plain by Section 224(a)(5), which was designed to prohibit ILECs from obtaining regulated access and rates for pole attachments. 47 U.S.C. § 224(a)(5). If Section 224(a)(4) could be read in isolation, ILECs could obtain regulated access for pole attachments at either the applicable rate for cable or telecommunications services. (As absurd as

this result might sound, it is only one step removed from the reality, whereby AT&T could enjoy the cable rate for pole attachments that are used to provide Internet telephony.)[9] Instead, Congress added Section 224(d)(3) and Section 224(e) to clarify that regulated rates apply only to cable or telecommunications *services* provided by a cable television system or a telecommunications carrier, which is not an ILEC according to Section 224(a)(5).

While it may be laudable to promote and expand the provision and even the nature of Internet service, it is beyond the scope of Section 224 to make electric utilities and their ratepayers bear the cost. *See generally Texas Power & Light Co. v. FCC*, 784 F.2d 1265 (5th Cir. 1986)(vacating FCC decision excluding costs of obtaining rights-of-way); *Alabama Power Co. v. FCC*, 773 F.2d 362 (D.C. Cir. 1984)(holding FCC improperly excluded non-cable related costs including guys and anchors); *but see In the Matter of Rules and Policies Governing Pole Attachments*, Report and Order, CS Docket No. 97-98, 15 FCC Rcd 6453, 6475-76 and 6484-85 (2000) (excluding certain FERC accounts from pole attachment rate formula, "even if they include some capital expense incurred with respect to all electric power distribution plant.") In the 1996 Act, Congress addressed Internet services only to express its intent that such services remain "unfettered by Federal or State regulation." Pub. L. No. 104-104, Tit. V, § 509, 110 Stat. 138 (47 U.S.C. § 230(b)(2)(Supp. IV 1998)). Moreover, it clearly expressed its intent contrary to providing pole attachments for wireless

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[9] *See generally* Jason Oxman, *The FCC and the Unregulation of the Internet*, 1999 FCC Lexis 3370 at 53-57, citing *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee*, FCC No. 99-24 (rel. Feb. 18, 1999) (advocating that the FCC should continue to resist imposing the panoply of common carrier regulations (including access charges and universal service) on cable Internet services, such as Road runner and @Home provided by AT&T).

communications equipment, when it expressly preserved local and state jurisdiction over the siting of personal wireless facilities. *See* Section 704 of the 1996 Act (codified at 47 U.S.C. § 332(c)(7)(A)). Moreover, nowhere did Congress evince any intent to invade, more than the absolute minimum necessary, state regulation of the facilities used for retail, "distribution" electric services. Therefore, the FCC must not enlarge its own jurisdiction in order to promote what it views as a beneficial telecommunication policy by regulating pole attachments for wireless equipment and cable modem services.

The FCC's actions are especially egregious in light of the issues and changes facing the electric utility industry today. Agencies, especially those with little or no expertise in the area, must not interfere with critical infrastructure over which they have expressly limited jurisdiction. For all of the above reasons, we respectfully urge this Court to affirm the decision below.

Respectfully submitted,

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